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No. 01-1368

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NEVADA DEPARTMENT OF HUMAN RESOURCES, ET AL.,
Petitioners,

v.

WILLIAM HIBBS, ET AL.,
Respondents.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT WILLIAM HIBBS

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QUESTION PRESENTED

Whether the family-care provision of the FMLA, 29 U.S.C. § 2612(a)(1)(C), is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of Congressional power to abrogate the States' sovereign immunity from suit by individuals.

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STATEMENT

The Family and Medical Leave Act of 1993 ("FMLA" or "Act") is directed at a leading source of unconstitutional sex discrimination today: the pervasive sex-role stereotype that caring for children and ill family members is women's work, a stereotype long embodied in hundreds of expressly sex-based state laws. It is difficult to think of a sex-based generalization that is more firmly and widely held than the assumption that a woman, because of her sex, will have greater responsibility than an otherwise similarly situated man for raising children and caring for family members when they are sick. The public record confirms that States often engaged in sex discrimination based on those convictions. Observation of the average tendencies of men and women has reinforced that sex-based over-generalization, but the tendencies of men and women to conform to "the role-typing [that] society has long imposed," *Stanton v. Stanton*, 421 U.S. 7, 14 (1975), cannot support States' use of sex as a proxy in decision making.

The FMLA is directly targeted at the fault line between work and family, precisely where sex-based overgeneralization has been and remains at its strongest. Consistent with this Court's equal protection jurisprudence, Congress in the FMLA addressed persistent and widespread problems of sex-based leave policies and practices and related forms of discrimination, as well as the lingering effects of broader historical state sex discrimination that has reinforced and perpetuated a sex-based division of family and workforce responsibilities. For the same reasons that this Court's modern equal protection doctrine has focused on preventing the official sorting of women and men into separate family and workplace spheres, barring that conduct is also at the heart of Congress's power under Section 5. The FMLA thus lies within Congress's authority to override state sovereign immunity and subject States to damages actions under the FMLA.

1. Background to the FMLA

Congress enacted the FMLA in the wake of a dramatic increase in workforce participation of women who were also primary caregivers at home for dependent or ill family members. Congress noted that the female civilian labor force more than doubled between 1950 and 1990. S. Rep. 103-3, at 5 (1993). By 1993, "74 percent of women aged 25-54 [were] in the labor force. Fifty-six percent of mothers with children under age six and 51 percent of mothers with children under age one [were] in the labor force." *Id.* at 6. At the same time, Congress noted, women retained their role as family caregivers. In addition to being primary caretakers for small children, women accounted for two-thirds of the non-professional care-givers to the elderly. *Id.* at 7. A 1990 study found that, due in part to lack of adequate family medical leave, 11 percent of family caregivers left the workforce to provide care. *Id.* at 7. Congress found further that the aging of the American population promised to intensify tensions between family needs and work demands, especially for women: "With men and women alike as wage earners, the crucial unpaid caretaking services traditionally performed by wives—care of young children, ill family members, aging parents—has become increasingly difficult for families to fulfill." *Id.* at 7.

That acceleration of women's labor force participation occurred at a time when legal prohibitions against sex discrimination were well established, yet working women still faced entrenched obstacles to workplace advancement. A prominent study showed that women were no better off economically in 1983 than they were in 1959, "mainly because they hold the prime responsibility for children," and concluded that, as long as parental responsibility "is borne disproportionately by women, sex differences in the labor mar-

ket are likely to persist."[1] Of particular relevance, women faced a "glass ceiling" in state government: In 1990, women held only 31.3 percent of high-level state and local government jobs nationwide, while they comprised 43.5 percent of the balance of the public workforce. Associated Press, *Few Women Found in Top Public Jobs: Study Sees 'Glass Ceiling' at State and Local Agencies*, N.Y. TIMES, Jan. 3, 1992, at A12. State governments showed even poorer performance than local governments, and at cabinet levels women held only 19.8 percent of state jobs. *Id.*

While family responsibilities affected women's workplace advancement, the influx of women into the labor force also intensified pressures on families seeking to provide care for children or sick family members. Those pressures sharpened the need to prevent employers' decisions at the work-family juncture—whether as to men's family leave or the hiring and promotion of women—from being improperly corrupted by sex bias relating to family leave needs. Employers still adhered to double-edged stereotypes, ultimately harmful to men and women, including "assumptions that women should take primary responsibility for children and family matters, and that men have to work, while women have a choice." Debra B. Schwartz, *An Examination of the Impact of Family-Friendly Policies on the Glass Ceiling*, 36 (1994).[2]

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[1] *See The Parental and Medical Leave Act of 1986: Joint Hearings Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the Comm. on Education and Labor*, 99th Cong., 2d Sess. 61 (1986) (testimony regarding results of study by Stanford University Bureau of Economic Research).

[2] The American Bar Association testified in Congress that, "[h]istorically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive assumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be. Current employment practices, because of sex discrimination against men, may in some cases, make it more difficult for men than for women to accommodate family responsi-

Congress determined that a federal guarantee of job-protected family leave available on a sex-neutral, nondiscretionary basis would help to counteract intractable forms of sex discrimination in employment.

2. The FMLA

In the introductory "Findings" and "Purposes" sections of the FMLA, Congress expressly invoked its power to enforce the Fourteenth Amendment. A central purpose of the Act was "to promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection] clause [of the Fourteenth Amendment]." 29 U.S.C. § 2601(b)(5). Congress found that lack of a right to job-protected leave for employees who need to care for new children or sick family members can force individuals into conflicts between family and work. *Id.* § 2601(a)(2), (a)(3). Congress found that, "due to the nature of the roles of men and women in our society"—roles that state laws long supported—"the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." *Id.* § 2601(a)(5). Congress's findings emphasized the vital interest in assuring that "fathers *and* mothers" have an equal opportunity to participate in family care. *Id.* § 2601(a)(2) (emphasis added).

The FMLA remedies lingering effects of States' support for a sex-based division of labor between family and the paid workforce by making it more feasible for women to work and advance in their jobs and still respond to acute family-care needs, and for men to respond to such needs even when their employers would otherwise disapprove. The Act seeks "to balance the demands of the workplace with the needs of

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bilities without suffering adverse consequences." *The Family and Medical Leave Act of 1989: Hearing Before the Subcomm. on Labor-Management Relations of the Comm. on Education and Labor*, 101st Cong., 1st Sess. 248 (1989) (statement of Clifford D. Stromberg, ABA).

families . . . in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons . . . on a gender-neutral basis." *Id.* § 2601(b)(1)&(4). By extending a right to leave on a nondiscretionary, sex-neutral basis, the FMLA counters the double-edged discrimination arising from the assumption that women need more leave: bias against men in family leave, and against women in employment generally.

The FMLA entitles eligible employees to take up to 12 work weeks of unpaid, job-protected family leave per year in certain circumstances that place extraordinary demands on families: the birth, adoption or foster care placement of a child (*Id.* § 2612(a)(1)(A)&(B)), or the need to care for a spouse, child or parent with a serious health condition (*Id.* § 2612(a)(1)(C)). It also provides for medical leave for an employee's own serious health condition that renders him or her unable to perform the functions of the job (subsection (D)). *Id.* § 2612(a)(1). Upon return to work at the conclusion of FMLA leave, an employee must be reinstated to his or her former position or its equivalent. *Id.* § 2614(a). The FMLA also specifically prohibits retaliation against any individual for "opposing any practice made unlawful by this subchapter." *Id.* § 2615(a)(2); *see also* 29 C.F.R. § 825.220(e) ("Individuals . . . are protected from retaliation for opposing . . . any practice which they reasonably believe to be a violation of the Act or regulations.").

Congress clearly expressed its intent to abrogate states' sovereign immunity by defining covered "employers" to include "any public agency" as defined in the Fair Labor Standards Act. 29 U.S.C. § 2611(4). The Act authorizes a private right of action against any person who "interfere[s] with, restrain[s] or den[ies] the exercise of" FMLA rights. *Id.* § 2615(a)(1). FMLA remedies include equitable relief such as reinstatement, damages for lost pay and benefits *or* other actual monetary losses sustained (capped at an amount equal

to 12 weeks of wages or salary for the employee), interest, and fees and costs. 29 U.S.C. § 2617(a)(1)(A)(i)&(ii), (a)(1)(B), (a)(3). If an employer's conduct was in bad faith and was not based on a reasonable interpretation of the Act, the employer may also be liable for additional, liquidated damages in an amount equal to the total actual damages plus interest. *Id.* § 2617(a)(1)(A)(iii).

In the decade since the FMLA was enacted, experience has borne out Congress's hope that it would prove to be an effective and minimally burdensome response to persistent sex discrimination relating to the family-work balance. Studies show increased use of family leave by men, *see* Carol Kleiman, *More Are Using Family Leave Act, Especially Men*, CHICAGO TRIBUNE, Feb. 5, 2002, at 1, and the majority of employers find the FMLA easy to administer and not costly. *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys* (2000 Update) at 6-9, 6-13. While the limited damages remedy is critical in deterring violations, damages awards under Section 2612(a)(1)(C) are both rare and modest, imposing negligible costs on employers.

3. Nevada's Violation of William Hibbs' FMLA Rights

William Hibbs was a social worker for the Welfare Division of the Nevada Department of Human Resources. In 1996, his wife, Dianne, suffered a severe neck injury in a car accident. Initial surgery left her by Spring of 1997 with severe pain and at grave physical and emotional risk: addiction to prescribed pain medications caused her to become clinically depressed and suicidal, necessitating at one point that she be admitted to a hospital psychiatric unit. She also had a metal plate in her neck from which the screws stripped and loosened, pressing against her esophagus and requiring her to be extremely careful in moving her body so as to avoid a fatal puncture. Her doctors recommended additional surgery,

and personal care by her husband in the interim. D. Ex. J, K, O, CC, DD.[3]

Hibbs obtained petitioners' approval for 12 weeks of unpaid FMLA leave to be taken as needed, and had used three weeks of it when he learned that he might be eligible for paid leave under Nevada's discretionary Catastrophic Leave (NCL) program.[4] He applied for and was awarded 9½ weeks of NCL leave. He preferred to take the paid NCL leave first and reserve the balance of his unpaid FMLA leave, so he started taking NCL leave as of August 11. He had enough approved NCL leave to last until October 20, after which he expected to use his remaining 9 weeks of unpaid FMLA leave to carry him through his wife's surgery, which was scheduled for November. P. Ex.1 (Hibbs Aff. ¶ 9);[5] D. Ex. D, N, O, T.

Hibbs was thus surprised to receive an October 10 letter informing him not only that his NCL leave would be exhausted in a few days, but that his "FMLA leave of 12 weeks ha[d] been fulfilled," and suggesting that he needed to apply for more NCL leave or return to work by October 20th. He immediately submitted new medical documentation and received the Welfare Division's approval on October 21 for five additional weeks of discretionary NCL leave. He also arranged to meet with petitioners to clear up the apparent

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[3] "D. Ex. __" refers to exhibits accompanying defendants' motion for summary judgment, which is included in their record excerpts on appeal at CR 55.

[4] Under that program, employees with accrued, unused annual or sick leave may donate it to other employees in specified circumstances, including an immediate family member's serious illness or accident. Nev. Rev. Stat. 284.362 to 284.3629. Qualifying employees may request up to a maximum of 26 weeks, or six months, of catastrophic leave in a calendar year. Nev. Rev. Stat. 284.3622.

[5] "P. Ex. __" refers to exhibits to plaintiff's motion for partial summary judgment, which appear at Tab D in plaintiff-appellant's excerpts of record on appeal.

confusion regarding his FMLA leave. Petitioners appeared to have counted his NCL leave against his 12-week FMLA entitlement, but they could not lawfully do so because they had failed to give him advance, individualized notice as the FMLA requires for any such offset.[6] At the meeting, on or about November 3, Hibbs asserted that petitioners were misreading the FMLA in concluding that his FMLA leave ran concurrently rather than consecutively with his NCL leave. Petitioners assured him that he would be given "ample notice of any decision taken by Nevada State Welfare." P. Ex. 1 (Hibbs Aff. ¶ 9, 12); D. Ex. X, CC, DD, AA.

Two days later, however, with no notice or other effort to work out a mutually acceptable arrangement with Hibbs, petitioners abruptly retracted their support of the renewed NCL leave he had just started to use, recalling the papers from the Director's Office where they were awaiting final sign-off. The following day, November 6, they delivered to Hibbs a letter threatening disciplinary action if he did not re-

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[6] The FMLA permits employers to require their employees to count "accrued paid vacation leave, personal leave, . . . family leave [or "medical" or "sick leave"] against the employee's FMLA leave allotment. 29 U.S.C. § 2612(d)(2)(A). An employer may only do so, however, if it gives the employee individualized, advance notice "within one or two business days [after notice of the need for leave is given] if feasible." 29 C.F.R. §§ 825.208(a), 825.301(c). The court of appeals erroneously stated that Hibbs "was informed that the [catastrophic leave] would 'be counted against [his] annual FMLA leave entitlement,'" Pet. App. 2a, when in fact the phrase the court quotes appears only on the form approving Hibbs' request for *unpaid FMLA leave* and makes the wholly unsurprising assertion that *that* leave would be counted against his annual FMLA leave entitlement. D. Ex. R. In any event, the court of appeals recited the facts only as background to its resolution of the Section 5 issue, and did not make any determination of absence of factual dispute regarding notice. Because the case comes here from denial of petitioners' motion for summary judgment, this Court should view the record, and draw all reasonable inferences from it, in Hibbs favor. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); Fed. R. Civ. P. 56(c), (e).

turn to work by November 12. Hibbs' efforts to discuss the situation further and to assert his right to unexpired FMLA leave met with a written reprimand citing his absence, and Director Firpo's response that she could not answer leave questions. On December 5, Firpo recommended Hibbs' dismissal for having been "absent without leave" since November 12, and the dismissal became effective on December 22, 1997. After a postponement while her husband prepared for and participated in a hearing relating to his dismissal, Dianne Hibbs underwent surgery in Arizona around the end of 1997.[7] D. Ex. AA, EE, FF, GG, HH; P. Ex. 1 (Hibbs Aff. ¶ 11). (A more detailed recitation of these facts appears in Respondent's Brief in Opposition to the Petition for Certiorari.)

4. Proceedings Below

On April 20, 1998, Hibbs filed suit in federal district court. Hibbs claimed that petitioners violated the FMLA by retaliating against him when he opposed their efforts to count his NCL leave against his FMLA leave, and by firing him while he was on approved, unexpired FMLA leave. Hibbs sought back pay, damages, declaratory and injunctive relief including reinstatement, interest, fees and costs, and all other appropriate relief. On petitioners' motion for summary judgment, the district court ruled from the bench that Hibbs'

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[7] Petitioners' statement that Hibbs received 12 weeks of FMLA leave "and over 500 hours [*i.e.*, 12½ weeks] of paid leave through Nevada's personal and family-care leave programs," Pet. Br. 14, misleadingly suggests that he received 24½ weeks of leave. In total, Hibbs received three weeks of unpaid FMLA leave and 9½ weeks of paid NCL leave, all of which Nevada pre-approved. Petitioners' figure double-counts his FMLA leave, assuming away the very issue in dispute by asserting that he was permitted to take all his FMLA leave. Their figure also apparently counts against him his three weeks of accrued annual and sick leave that he had earned and used before he even requested FMLA leave. Petitioners now point to Nevada's law permitting employees up to one year of leave without pay, *id.* at B-3 - B-4, as available for "care for a sick family member," *id.* at 6, but petitioners notably failed to afford any such leave to Hibbs when he urgently needed it for precisely that purpose.

FMLA claim was barred by the state's sovereign immunity. Pet. App. 47a-58a.

The United States intervened on appeal to defend the constitutionality of retrospective relief in private actions against state employers who violate 29 U.S.C. § 2612(a)(1)(C), and the court of appeals reversed the decision of the district court. The court unanimously held that Congress, in enacting the FMLA, had properly exercised its authority to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment in order to remedy and prevent unconstitutional sex discrimination. Pet. App. 12a-42a. The court reasoned that this Court's heightened standard of equal protection review of sex-based discrimination, which is itself based on a recognition of the pervasive character of sex-role stereotyping about work and family, justifies granting Congress greater leeway in identifying such problems for Section 5 purposes. Pet. App. 17a-19a. The court found that the legislative history showed "widespread *intentional* gender discrimination by states," whose "discriminatory leave policies are just the sort of difficult and intractable problem that justifies broad prophylactic measures in response." Pet. App. 21a (emphasis in original). Alternatively, the court found ample support for the FMLA's remedial character in that it was "designed to undo the impact of [a] history of state-supported and mandated sex discrimination as it continues to affect private and public employment." Pet. App. 23a.

The court of appeals concluded that the FMLA is a congruent and proportional response to States' unconstitutional sex discrimination because the Act "focuses on only one type of policy," family leave, the guarantee of which Congress concluded would be a "a modest step" toward counteracting sex discrimination by state and non-state employers alike. Pet. App. 36a. The court reasoned that a sex-neutral remedy is congruent and proportional because the discrimination affects both sexes. A sex-neutral solution both avoids unconstitutionally benefiting women alone based on over-broad generalizations that men do not also need family medical

leave, and blunts incentives to discriminate against women born of expectations that they will take more leave than men. *Id.* at 36a-40a.

SUMMARY OF ARGUMENT

One key objective of the FMLA is to remedy and deter unconstitutional sex discrimination in state employment. Recognizing that decisions about leave and employment often were tainted by stereotyped views about women's and men's proper roles in the family and workplace, and that explicitly sex-discriminatory state laws and practices had played a central role in reinforcing and perpetuating those stereotypes, Congress carefully crafted a remedy directed at the very intersection of work and family: family leave. As such, the FMLA lies at the heart of Congress's authority under Section 5 of the Fourteenth Amendment to remedy sex discrimination, and Congress properly exercised that authority to abrogate the states' immunity from damages actions.

Because the FMLA is directed at sex discrimination and specifically targets the very stereotypes about family and work that this Court has long recognized as a basis for its own heightened scrutiny of sex-based classifications, Congress should be granted substantial deference in regard to this exercise of Section 5 authority. This Court's Section 5 standards should therefore apply differently here than in cases involving classifications such as age or disability, which are subject only to rational basis review and thus presumptively constitutional. In particular, Congress should be permitted in exercising its Section 5 powers to rely on the same factual basis that this Court itself has relied on in interpreting Section 1 of the Fourteenth Amendment to require heightened scrutiny for all sex-based classifications—namely, the long history of discriminatory laws and policies in every State with respect to work and family roles, and the continuing stereotyped views of men's and women's proper roles that such discrimination fostered. Similar deference is appropriate in assessing Congress's chosen means to combat sex dis-

crimination, which the Court has itself recognized as subtle and enduring.

There is no basis for petitioners' belated effort to characterize the FMLA as an exclusive exercise of Commerce Clause authority (Pet. Br. 21-27). A section of the FMLA's statement of purposes that petitioners notably ignore expressly states that the Act was also based on Congress's power to enforce the Fourteenth Amendment. Indeed, the fact that Congress was exercising its Section 5 power to remedy sex discrimination was so plain that petitioners affirmatively conceded it below.

The FMLA is a remedy for and prophylactic against States' different treatment of men and women due to sex-based stereotypes about men's role as breadwinner, and women's role in tending to the family. The Act addresses three related forms of state discrimination: the continuing effects of States' past explicitly sex-based laws and practices, States' unconstitutionally granting women more family leave than men, and state employers' reluctance to employ women because they believed that women are more likely than men to take leave.

The FMLA responds to a form of sex discrimination that this Court has itself vividly described and resoundingly condemned in dozens of opinions over the last 30 years. Every State has a history of sex-based legislation reflecting and reinforcing the view that women are mothers first and workers second. The legislative record recounts the legacy of that discrimination for women in terms of depressed earnings and reduced opportunities in the absence of rights to family leave. Petitioners' effort to cast the results of a long and unfortunate pattern of state sex discrimination as nothing but a benign "social reality" (Pet. Br. 41) ignores volumes of history.

The record before Congress also reflected the States' continuing unconstitutional differential treatment of the sexes. As recently as 1987, almost twice as many women as men in state employment were offered parenting leave. Many state labor agreements and employment policies ex-

plicitly gave women, and not men, leave for child rearing. And when leave decisions were discretionary, they often invited resort to sex-role stereotypes. The record also shows that employers discriminated against women, especially women of child-bearing age, presuming them to be less attached than men to the workforce due to their family responsibilities. The seriousness and intractability of the discrimination identified in the legislative record and in "confirming judicial documentation" support Congress's decision to enact federal family leave legislation.

The FMLA is a congruent and proportional response to the discrimination Congress sought to address. The FMLA establishes a specific requirement that applies to only one narrow area of state employment policy—family and medical leave. Establishment of a minimum, non-discretionary threshold period of 12 weeks of unpaid leave remedies the disproportionate impact, rooted in a history of *de jure* discrimination, that lack of guaranteed leave imposes on women, and forestalls further discrimination. Casting the FMLA in sex-neutral and job-protected terms was critical to eroding the stereotyped link between women and family care, and thereby helping both to remedy leave discrimination against men and to alleviate *ex ante* employment discrimination against women.

Finally, the FMLA's damages provision is carefully limited, authorizing *either* actual damages (not to exceed an amount equal to 12 weeks of the employee's salary) *or* back pay, and liquidated damages doubling the compensatory amount only where the employer has acted in bad faith or without a reasonable basis. Because the FMLA rests on a sound basis and is drawn to avoid undue burdens on state and private employers alike, it is an appropriate exercise of Congress's Section 5 power.

In addition to his claim for leave, Hibbs has presented evidence of unconstitutional retaliation for the exercise of a federal right, in violation of due process and the First Amendment. On this basis alone, the Court has an independ-

ent ground for upholding the FMLA remedy for retaliation claims. Because state retaliation for exercise of a federally protected right is itself unconstitutional, it is appropriately the subject of an FMLA suit for damages against the States without regard to whether the FMLA also properly extends to conduct that is not itself unconstitutional.

ARGUMENT

I. SECTION 2612(a)(1)(C) IS APPROPRIATE SECTION 5 LEGISLATION.

A. Greater Judicial Deference Is Appropriate In Reviewing Congress' Enforcement Of The Fourteenth Amendment Against Forms Of Discrimination Subject To Elevated Scrutiny Than When Congress Acts Against Discrimination Subject Only To Rational-Basis Review.

Because the FMLA remedies unconstitutional sex discrimination at one of its most persistent focal points—the intersection of work and family—it lies in the core of Congress's Section 5 authority. The FMLA addresses the very sex-role stereotypes that this Court itself has pointed to as justification for heightened scrutiny of sex-based classifications. The Court accordingly should review with deference Congress's conclusion that there is a constitutional problem warranting legislation, and grant Congress sufficient leeway in prohibiting otherwise constitutional conduct as a means of enforcing the Equal Protection Clause. As this Court has emphasized, "[t]he appropriateness of remedial measures must be considered in light of the evil presented." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 89 (2000).

The Reconstruction Amendments' enforcement clauses are distinctive among the Constitution's individual rights provisions in giving Congress enforcement authority coordinate with the authority of the courts. The clauses were framed with a recognition that the full force of the respective capabilities of both the judiciary and the Congress would be required to achieve equal protection. They thus harness

Congress's distinct and powerful abilities, including its capacities to find facts and fashion remedies, to assess overall patterns and risks of unconstitutional behavior, create remedies where there is reason to believe that case-by-case adjudication may be inadequate, and act prospectively. *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 196 (1997) ("deference must be accorded to [Congress's] findings as to the harm to be avoided and to the remedial measures adopted to that end.").

In light of its recognition of racial discrimination as presumptively unconstitutional and an especially "[d]ifficult and intractable problem," *Kimel*, 528 U.S. at 88, the Court has accorded Congress more leeway in responding to it under Section 5 than it has with respect to classifications, such as age or disability, which this Court has treated as presumptively constitutional. The same deference should apply here because sex discrimination is also presumptively unconstitutional and a "difficult and intractable problem." *Id.* Thus, to affirm the validity of Congress's ends the Court need only "perceive a basis," *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966), for Congress to conclude that sex discrimination by States continues to affect employees at the intersection of job and family duties. *See Boerne*, 521 U.S. at 527 (approving *Morgan's* factual-basis holding) The Court also should review with deference Congress's chosen means of addressing the problem; it is for Congress "to assess and weigh the various conflicting considerations," *Morgan*, 384 U.S. at 653, and "to use any rational means to effectuate the constitutional prohibition" against sex discrimination. *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

1. The Court should more readily perceive grounds for congressional efforts to respond to suspect-class discrimination.

This Court has relied on the history and continuing effect of sex-role stereotyping about work and family to justify interpreting Section 1 of the Fourteenth Amendment to require heightened scrutiny of sex-based classification where there is

reason to believe that case-by-case adjudication may be inadequate, *Virginia*, 518 U.S. at 531 ("Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history."). In exercising its Section 5 power, Congress should likewise be permitted to take notice of that history and act in ways that are, in effect, the legislative counterpart to heightened scrutiny. When it does so, Congress helps to implement this Court's own equal protection standards so that we may more effectively remove continuing barriers to equality of the sexes, just as Congress's legislative response to racial discrimination has been critical in dismantling segregation and its legacy.

A half-century of state separate-spheres legislation has reinforced and calcified notions about men's and women's sex-appropriate work and family roles. Our nation's history of unjustified sex discrimination raises real concerns that government will continue to rely on unsupported notions about sex differences: "[A] traditional classification is more likely to be used without pausing to consider its justification . . . Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female . . ." *Mathews v. Lucas*, 427 U.S. 495, 520-521 (1976) (Stevens, J., dissenting). Such reflexive habits do not dissolve in the face of simple prohibitions against discrimination. Our current leadership generations came of age at a time when it was still "the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any 'basis in reason' could be conceived for the discrimination." *Virginia*, 518 U.S. at 531, *quoting Goesaert v. Cleary*, 335 U.S. 464, 467 (1948). In light of the established history of ingrained state and private sex-role stereotyping about work and family roles that has demonstrably harmed both women and men, it is eminently appropriate for Congress, as it did in the FMLA, to legislate in favor of official sex neutrality and individual choice on matters of work and family.

In reviewing Section 5 legislation addressed to racial discrimination, the Court has said that "Congress may avail itself of information from *any probative source.*" *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966) (emphasis added). The same should be true for legislation designed to remedy sex discrimination. Here, it is appropriate to consider not only the legislative record of the FMLA itself, but also Congress's prior legislative enactments, decisions of this and other courts (of which Congress is presumed to be aware, *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978)), census data, reports by executive branch agencies and others, generally available studies and analyses, as well as illustrative state laws, policies, and labor agreements. No one could seriously dispute that the constitutional problem Congress sought to address in the FMLA was widespread among state and private employers alike.

At the same time, it is precisely *because* there are "volumes of history" establishing the existence and evils of sex-based discrimination that sex-based classifications are subject to skeptical scrutiny in the first place, *Virginia*, 518 U.S. at 531, and Congress need not revisit that history in exhaustive detail in the legislative record before legislating to remedy it. Even though the Court gives special weight to material that Congress has affirmatively identified in findings and record, *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-372 (2001); *Kimel*, 528 U.S. at 90-91; *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Fund*, 527 U.S. 627, 640 (1999), there is no requirement that there be a detailed legislative record, *Kimel*, 528 U.S. at 91 (lack of a showing in the ADEA's legislative history of any widespread pattern of unconstitutional state conduct was "not determinative of the Section 5 inquiry."). As this Court has consistently recognized, "judicial deference, in most cases, is based not on the state of the legislative record Congress compiles, but 'on due regard for the decision of the body constitutionally appointed to decide.'" *Boerne*, 521 U.S. at 531. Rather, a congressional record may be useful where the unconstitu-

tional state conduct at which a federal law aims is not readily "visible to the naked eye." *Cf. United States v. Morrison*, 529 U.S. 598, 612 (2000) (formal findings are not required to support commerce clause legislation, but "the existence of such findings may enable us to evaluate the legislative judgment that the activity in question substantially affects interstate commerce even though no such substantial effect is visible to the naked eye."); *United States v. Lopez*, 514 U.S. 549, 562 (1995). Here, however, the problem was plainly visible to all who studied workplace inequality.

The suspect quality of sex as a basis for state action makes appropriate here a different approach to the legislative record than the one employed in *Garrett* and *Kimel*. The Court in those cases found inadequate factual predicates when judged "against the backdrop of [its] equal protection jurisprudence," which applies rational basis review and therefore generally *permits* reliance on age or disability except where wholly irrational. *Kimel*, 528 U.S. at 86; *see Garrett*, 531 U.S. at 366-367. The Court noted that Congress had responded to what appeared to be merely a tendency of officials to make age- or disability-based distinctions—conduct that is presumptively lawful. As the Court explained in *Kimel*, States can draw lines based on age "when they have a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases." 528 U.S. at 85-86. Thus, in order to impugn the constitutionality of state conduct with respect to non-suspect classes such as the disabled or the elderly, Congress must identify, not just the existence of age- or disability-based state decisions, but a "widespread pattern" of *irrational* reliance on such criteria. *Id.* at 90.

As demonstrated below, Point I.D., there is no question that workplace bias based on stereotypes about men's and women's family roles—the discrimination that the FMLA seeks to remedy and prevent—is both widespread and unconstitutional. This Court's heightened scrutiny itself rests on that conclusion. Accordingly, the Court need only "perceive

a basis" for the FMLA to satisfy the first prong of the Section 5 inquiry.

2. The Court should more readily sustain Congress's choices of powerful remedies where legislation responds to difficult and intractable problems subject to elevated judicial scrutiny.

The fact that the FMLA seeks to remedy sex discrimination should also affect the Court's review of the means Congress has chosen. The congruence and proportionality analysis that this Court has developed in recent cases addressing classifications subject only to rational basis review should be applied with sensitivity to the need for "powerful remedies" for intractable problems like the sex discrimination at issue here. *Kimel*, 528 U.S. at 88-89 ("Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.").

States' subtle and entrenched reliance on over-broad sex-based generalizations has proved especially resistant to judicial and legislative efforts to achieve sex equality with simple prohibitions against discrimination. In such circumstances, Congress has enhanced power to fill the gap by addressing under-enforcement in ways that the courts are not able to do. *See South Carolina*, 383 U.S. at 328 (finding Section 5 legislation appropriate where "case-by-case litigation was inadequate to combat widespread and persistent discrimination"); *Boerne*, 521 U.S. at 526 (accord). In particular, where patterns of sex-based decision making are likely to fall through the cracks of judicial sanction, Congress may—as it did in the FMLA—use its Section 5 authority to fashion an affirmative remedy that goes beyond a bare prohibition against sex discrimination. *See South Carolina*, 383 U.S. at 334 (approving required pre-clearance of voting changes as remedy for racial discrimination). This Court has made clear that in addressing state determination subject to heightened levels of review, Congress may use "any rational means," *Oregon v. Mitchell*, 400 U.S. 112,175 (1970), and that it is for Congress

to assess and weigh the various conflicting [remedial] considerations." *Morgan*, 384 U.S. at 653 This Court should therefore review with deference Congress's choice to afford a right to a minimum period of nondiscretionary, job-protected leave as a remedy for the sex discrimination it targeted.

In disputing the notion that this Court's elevated scrutiny of sex discrimination properly informs Section 5 analysis, petitioners cite *United States v. Morrison*, 529 U.S. 598, 620-626 (2000), and *City of Boerne v. Flores*, 521 U.S. 507 (1997). Pet. Br. 42-44. But the decisive flaw in the Violence Against Women Act (VAWA) at issue in *Morrison* was that the Fourteenth Amendment prohibits only state discrimination, whereas VAWA created a private right of action authorizing suit against private individuals. VAWA thus lacked congruence with the asserted equal protection right. *Id.* at 626. And the very point of *Boerne* was that failure to accommodate religion is *not* ordinarily subject to elevated constitutional scrutiny under this Court's free exercise jurisprudence, so that opinion can hardly be viewed as guidance regarding the enforcement of rights triggering heightened judicial scrutiny.

B. Congress Clearly Sought To Exercise Its Power Under The Fourteenth Amendment Enforcement Clause.

Although this Court has never required as much, Congress explicitly invoked its Fourteenth Amendment power to remedy sex discrimination as a basis for the FMLA, announcing the Act's purpose "to promote the goal of equal employment opportunity for women and men, *pursuant to* [the Equal Protection] clause." 29 U.S.C. § 2601(b)(5) (emphasis added). From the start of the federal legislative process in 1984 to the 1993 session when Congress adopted the version signed into law, the congressional committees repeatedly invoked "not only Congress' power to regulate commerce under the Commerce Clause, but also its power to enforce the guarantees to equal protection and due process of the laws embodied in the Fourteenth Amendment." H.R.

Rep. 100-511, pt. 2, at 26-27 (1988).[8] All that is required is that the Court can "discern some legislative purpose *or factual predicate* that supports the exercise of Fourteenth Amendment power." *EEOC v. Wyoming*, 460 U.S. 226, 244 n. 18 (1982) (emphasis added); *see* Pet. Br. 26 (quoting same). Here, the record is so clear that Nevada expressly conceded below that the FMLA is properly regarded as Section 5 legislation, and stated that the only dispute is "whether the means adopted by Congress in the FMLA are congruent and proportional to the goal of preventing gender discrimination in this context." *See* Def-Appellee's Ans. Br. at 24-27 (11/15/99); Supp. Br. in Resp. to Br. of Interven. United States at 7 (4/16/01) ("Congress operated under the premise that the evil to be remedied was pervasive gender discrimination in the work place").

Petitioners' new insistence that the FMLA is grounded solely on Congress's commerce power, and that Congress invoked the Fourteenth Amendment only to explain the sex-neutral form of the legislation, *see* Pet. Br. at 21-27, is contradicted by the above record and rests on the false premise that a workplace law supported by the Commerce Clause cannot also be an anti-discrimination measure pursuant to Section 5. Petitioners are correct that Congress's invocation of the Equal Protection Clause in *one* of the FMLA's findings was intended to support the adoption of a sex-neutral remedy, 29 U.S.C. § 2601(b)(4); however, petitioners fail to mention that Congress again invoked the Clause in a *separate* finding to describe the substantive goal the Act was intended to achieve. 29 U.S.C. § 2601(b)(5). Nor do Petitioners' snippets of legislative history prove their point: The term "labor standard" was used in FMLA hearings as a

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[8] *See, e.g.*, S. Rep. 103-3, at 16 (1993) ("S.5 is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the Fourteenth Amendment."); S. Rep. 102-68, at 25 (1991) (same); H.R. Rep. 101-28, pt. 1, at 14-15 (1989) (same).

shorthand for a uniformly applicable, sex-neutral provision, and nothing about that term or Congress's concern for men's as well as women's leave needs detracts from the FMLA's character as legislation counteracting sex discrimination.[9]

C. The FMLA Responds To Unconstitutional Sex Discrimination As This Court Defines It.

The FMLA is addressed to a paradigmatic form of sex discrimination. This Court's equal protection jurisprudence is designed to bar state reliance on "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas,'" *Craig v. Boren*, 429 U.S. 190, 198-199 (1976), and to uproot the correlative sex bias against men when they are presumptively cast as family "breadwinners." *Frontiero v. Richardson*, 411 U.S. 677, 681 (1973). In recognition of the pervasive part that sex-role stereotypes, particularly those about work and family roles, have played in maintaining inequality between men and women, this Court skeptically scrutinizes discrimination not just against females, but against males as well. *Hogan*, 458 U.S. at 723-724; *Craig v. Boren*, 429 U.S. at 201; *see also Nguyen v. INS*, 533 U.S. 53, 92 (2001) (O'Connor, J., dissenting) (noting that to indulge "the stereotypical notion that mothers must care for the[ir] children and fathers may ignore them, quietly condones the 'very stereotype the law condemns.'"). When States treat female and male employees differently due to sex-based assumptions about their family responsibilities, they violate the Equal Protection Clause as this Court has interpreted it. This Court skeptically scrutinizes and presumptively rejects any state decision based on sex, *see generally United States v. Virginia*, 518 U.S. 515, 533 (1996), even when the State intends no disrespect of women, *see Hogan*, 458 U.S. at 725; and even where the generalization may be factually supported, *see Virginia*, 518 U.S. at 542.

[9] *See, e.g., The Family and Medical Leave Act of 1987: Joint Hearing Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 100th Cong., 1st Sess. 64, 66 (1987) (statement of Eleanor Smeal, President, National Organization of Women describing legislation as "an affirmative program to make sure that women workers are not discriminated against" and also as "a labor standard").

The FMLA targets at least three forms of unconstitutional sex discrimination (evidence of which is discussed in more detail below, *infra* Point ID). First, it targets the current effects of past sex-based state laws that limited women's workforce participation based on a "separate spheres" ideology. These effects include pervasive and intractable stereotypes that reinforce a sex-based division of home and work responsibilities that Congress expressly found still stands today as an obstacle to women's equal workforce participation. 29 U.S.C. § 2601(a)(5). States' failure to provide job-protected, nondiscretionary family leave thus disproportionately harmed women. While disparate impact alone is not a constitutional violation, where such impact flows from past, unconstitutional state conduct, Congress has Section 5 power to remedy it. *See Lopez v. Monterey County*, 525 U.S. 266, 283 (1999); *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966); *City of Rome v. United States*, 446 U.S. 156, 176 (1980).

Second, the FMLA targets States' practices, in some cases very recent, of offering women more family leave than men. Sometimes the disparity is codified, such as where "maternity" leave exceeds pregnancy disability and thus amounts to women-only parental leave. Sometimes the disparity arises in the way employers exercise their discretion to treat similarly situated women and men differently due to over-broad assumptions that women are primary family caregivers. As discussed below, Point I.D., the FMLA's legislative history documents significant, sex-based differentials in family leaves offered by state and private employers alike.

Third, the FMLA addresses the continuing problem of States' discrimination against women in hiring and promo-

tion because of sex-based stereotypes that a woman is likely to be less committed to the workforce than a similarly qualified man. Congress was aware of cases from the 1980s and 1990s showing that States, like other public and private employers, discriminated against women because of beliefs "that a woman should stay at home with her family." *Moore v. Alabama State Univ.*, 980 F. Supp. 426, 431 (M.D. Ala. 1997); *see generally cases cited infra note* 23.

Each of these forms of discrimination is plainly unconstitutional under this Court's definition of the equal protection right, and therefore Section 5 authorizes Congress to provide an appropriate remedy.

D. The Ample Record Of Unconstitutional Sex Discrimination By The States And The Risk Of Future Discrimination Confirms The Basis For The FMLA.

The trigger for the FMLA was a surge in the workforce participation of *women* and the increased problems of sex discrimination that accompanied that development.[10] Con-

[10] *See supra* at 2; *see, e.g.*, S. Rep. 103-3 at 5-6; H.R. Rep. 103-8, pt. 1 at 16-17; H.R. Rep. 103-8, pt. 2 at 10-11; S. Rep. 102-68, at 25-26. *See supra* at 2. S. Rep. 103-3 at 7 ("The effect of these demographic changes has been far reaching. With men and women alike as wage earners, the crucial unpaid caretaking services traditionally performed by wives—care of young children, ill family members, aging parents—has become increasingly difficult for families to fulfill"); H.R. Rep. 103-8, pt. 2 at 25 (citing Norton testimony, *Family and Medical Leave Act of 1987: Joint Hearings Before the Subcomm. on Civil Service of the Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess. 31 (1987) ("The disarray in much of family life in the United States today has proceeded from the economy's demand that women work, coupled with society's failure to accommodate its institutions to this economic reality."); *id.* at 17 (the "explosion in the number of elderly coupled with the dramatic influx of women—the traditional family caregiver[s]—into the workforce has made 'eldercare' a critical work issue . . . 2.2 million people, predominantly women, cared for 1.2 million frail elderly people in 1982 . . . And this, of course, is in addition to the more familiar figures for mothers with children who are young."); S. Rep. 102-68, 25-26 ("The once-typical

gress believed that a sex-neutral, job-protected family-leave right was needed to enable families to depart from the traditional, state-reinforced model of a mother with primary responsibility at home and a father with primary responsibility at work.[11] The FMLA is designed to meet family-care *and* workplace gender-equity objectives by guaranteeing that "[a] father, as well as a mother, can take family leave because of the birth or serious health condition of his child; a son as well as a daughter is eligible for leave to care for a parent," and by "permit[ting] families to choose which parent or sibling will attend to extraordinary family responsibilities in light of the

American family, where the father worked for pay and the mother stayed home with the children, is vanishing."); *The Parental and Medical Leave Act of 1987, Hearings Before the Subcomm. of the Senate Comm. on Labor and Human Resources, Part 2*, 100th Cong., 1st Sess. [hereinafter "1987 Senate Labor Hearing"] at 29-30 (1987) (testimony of state legislator that State had "predicated a lot of our ideas and a lot of our policies based on the myth that somehow or other this is what the family looks like," *i.e.*, "[t]he man is working and the woman is staying home taking care of the kids."); *Family and Medical Leave Act of 1987: Joint Hearing Before the House Committee on Post Office and Civil Service*, 100th Cong., 1st Sess. 31 (1987) [hereinafter "1987 Post Office Hearing"] ("Because working women continue to bear disproportionate responsibility for the nuts and bolts of family life, H.R. 925 may be viewed as feminist legislation"); *Parental and Disability Leave: Joint Hearing Before the Subcomm. on Civil Service and the Subcomm. on Compensation and Employee Benefits of the Comm. on Post Office and Civil Service*, 99th Cong., 1st Sess. 10 (1985) (statement of Wendy W. Williams, Assoc. Professor, Georgetown Univ. School of Law) (The FMLA "speaks tellingly to that crucial intersection between job and home where family needs clash with the demands of a work world which relies as never before on female labor but whose personnel policies are more suited to a male work force with wives performing the traditional and necessary functions in the home.").

[11] Both types of family leave provided in the FMLA—including parenting leave (subsections 2612(a)(1)(A) and (B)) and family medical leave (subsection 2612(a)(1)(C)) respond to the same stereotype about women's family role, so evidence showing that states acted on that stereotype provides common support for all three subsections.

family's preferences, needs, career concerns, and economic considerations." S. Rep. 103-3 at 24. Congress had an ample record upon which to base that conclusion.

1. Continuing effects of the States' past, overt sex discrimination.

Section 5 empowers Congress to remedy current effects of past unconstitutional conduct by the States. *See supra* at 23. The FMLA targets the intersection of work and family as a means of redressing the lingering harmful effects of state-mandated, entrenched sex roles. Congress found that, "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." 29 U.S.C. § 2601(a)(5). The Senate Committee noted that, "[i]n the absence of a family leave standard, childbirth and the need to care for a sick child or parent have an adverse impact on women's earnings." S. Rep. 102-68 at 28. The Committee reported that, "by the year after birth, the earnings of mothers were $1.40 lower [per hour] than those of women who did not give birth (although they had been higher before birth)," and "the cost of elder care is estimated at $4.8 billion annually in lost income (mostly to women)." *Id.*

A half century of state laws overtly discriminating on the basis of sex in employment played a central role in cementing the sex-based division of labor in the workplace to which Congress's finding refers. *See* Pet. App. 24a-30a; *see Brief of Amici Curiae Women's History Scholars Alice Kessler-Harris, Linda Kerber, et al.* at Point III (recounting legal history of state sex discrimination). Countless historical and legal sources, including many opinions of this Court, confirm the ubiquity of state action reinforcing a view of women as peripheral to the workforce due to their primary responsibilities for family care. *See, e.g.*, Steven K. Wisensale, *Family Leave Policy, The Political Economy of Work and Family in America*, at 100-114 (2001); Helen Tierney, *Women's Studies Encyclopedia*, at 1156-1158 (1999); Edith L. Fisch &

Mortimer D. Schwartz, *State Laws on the Employment of Women* (1953) (state-by-state survey of laws including hundreds of sex-based "protective" laws). Relevant sex-based laws hindering women's workplace equality often included leave laws that cast women as family care takers. *See infra*, Point I.D.2.a. Petitioners' suggestion that the sex-based differential in family caretaking roles that Congress referred to in 2601(a)(5) was simply an abstract "social reality" and not a "result of unconstitutional discrimination" by States, Pet. Br. at 41, is thus belied by reams of public records.

Sex-based state laws prohibiting women from working in many fields, limiting their hours, and making them less desirable employees through special protections requiring minimum wages and special amenities for women only prompted households to organize themselves so that men worked and women remained at home. That legislation hindered generations of women from demonstrating that they could compete in the paid workforce on equal footing with men. At the same time, it constrained working men from taking an equal share of responsibility for the care of dependent family members.

Even as many expressly sex-based state laws were invalidated or repealed, the enduring stereotypes sustained by state laws mean that women continued to shoulder primary responsibility for family care. Yet before Congress began to consider federal family leave legislation, virtually no States had family leave laws; and when the FMLA was enacted in 1993, many States still failed to grant any right to family leave. The absence of family leave coupled with the continuing effects of past discrimination, imposed substantial burdens on women as a class.

As Congress observed, "[t]wo-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women." H.R. Rep. 103-8, pt. 1, at 24 (1993); S. Rep. 103-3, at 7. When one member of a dual wage earner couple has to care for a sick child, 83 percent of employed mothers say they are more likely than their part-

ners to take time off. Families & Work Institute Study (1997). Past discrimination also left women with lower pay, less job security, shorter job tenure, and fewer accumulated benefits such as sick leave or vacation days, and therefore more vulnerable in the absence of family leave rights. *See Califano*, 430 U.S. at 318. Just as this Court has repeatedly approved Congress's efforts to prevent facially neutral policies from "freez[ing] the effect" of past unconstitutional racial discrimination, *South Carolina v. Katzenbach*, 383 U.S. at 334; *City of Rome v. United States*, 446 U.S. 156, 176 (1980), it should approve the FMLA as an effort to remedy the continuing effects of past sex discrimination.

2. States' continuing disparate treatment of women and men.

The FMLA also responded to continuing forms of sex discrimination. State employers, just like all employers, still relied on overbroad sex-based generalizations about the tendencies and capacities of women and men. States discriminated against men by granting more leave to women than to men, and against women by assuming that, where work-family conflicts arise, women were more likely than men to leave the job.

At the time the FMLA was under consideration, employers and the general public expressed overwhelmingly greater support for family leaves—and particularly for longer leaves—for mothers than for fathers, reflecting the still widely held belief that family care is women's responsibility.[12] And employers reacted negatively when a father

[12] *See, e.g.*, Opinion Roundup, PUBLIC OPINION, May/June 1987, at 37 (18% of people surveyed thought employers should be required to provide parental leave to women employees to care for newborns compared to 3% who thought employers should be required to provide it for men); Catalyst, Report on a National Study of Parental Leaves (1986) (cited in S. Rep. 103-3 at 15) (63% of employers thought men should take no unpaid parental leave, whereas only 20% thought women should take none).

planned to take any time off.[13] These stereotypes led States both to maintain overt sex discrimination in their laws and policies, and rely on covert sex-based considerations in discretionary employment decisions.

a. Overtly sex-based family leave laws and policies.

When Congress took up consideration of the FMLA, many States still had overtly sex-based family leave laws, policies and practices. The Bureau of Labor Statistics (BLS) reported that in 1987, 57 percent of female state employees were offered maternity leave whereas only 30 percent of male employees could take paternity leave. Department of Labor, Bureau of Labor Statistics, Employee Benefits Survey, from http://data.bls.gov query on leave.[14] The figures for 1990 were 51 percent versus 33 percent, and for 1992, 59 percent versus 44 percent. *Id.* Congress was well aware of BLS studies; indeed it cited a parallel set of results for the private sector. *See* S. Rep. No. 103-3, at 14-15 (citing BLS

[13] Catalyst, 65-66. *1987 Senate Labor Hearing*, at 287 (witness representing National Federation of Independent Businesses testified that "we certainly recognize that our ladies need the time but when we talk about a man taking leave because there is a new baby in the household, I cannot accept that from an employer's point of view."); *see* Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners, at 24 ("men are reluctant to take leave for family reasons because of the detrimental effect on their careers."). States employ these sex biases not only in employment contexts, but in family law as well, where state judges, for example, express the same stereotypes regarding the inappropriateness of "too much" paternal involvement in child rearing. *See, e.g.*, Maryland Special Joint Committee, Gender Bias in the Courts, at 26 (1989).

[14] The BLS figures refer to "nondisability maternity leave or paternity leave," and thus do *not* include pregnancy or childbirth-related disability leave. Joseph R. Meisenheimer II, *Employer Provisions for Parental Leave, Monthly Labor Review*, at 22 (Oct. 1989). Meisenheimer's article discusses private employer data in response to our inquiry; the BLS confirmed by e-mail that the cited figures regarding States also excluded pregnancy or childbirth-related disability leave.

figures that in 1990, 37 percent of employees were covered by maternity policies, while only 18 percent were covered by paternity policies). Congress was also aware that a 50-state survey had established that "public sector leaves don't vary very much from private sector leaves."[15]

Many States offered extended "maternity" leave that greatly exceeded the typical 4-8 week period of physical disability due to pregnancy and childbirth,[16] while granting no paternity leave at all. Longer leaves for women that are not attributable to differential physical needs presumptively violate equal protection, *Virginia*, 518 U.S. at 534. Fifteen States provided women up to one year of extended maternity leave, while only four States provided men a parallel benefit. Eleven States provided women up to six months of extended maternity leave, but only seven States gave men up to six months for paternity leave. Michelle Lord & Margaret King, *The State Reference Guide to Work-Family Programs for State Employees* (1991), 30. In addition, state leave laws often specified that catch-all leave-without-pay-provisions could be used for extended maternity leave, but did not authorize such leave for paternity purposes.[17]

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[15] 1986 House Joint Hearing, at 29-30 (testimony of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project); Kathleen Makuen, *Public Servants, Private Parents: Parental Leave Policies in the Public Sector, In The Parental Leave Crisis: Toward a National Policy* (Edward F. Zigler & Meryl Frank, eds., 1998), 202-03; 1986 House Joint Hearing, at 147 (Washington Council of Lawyers) ("Parental leave for fathers or adoptive parents is rare. . . Even where child-care leave policies do exist, men, both in the public and in private sectors, receive notoriously discriminatory treatment in their requests for such leave).

[16] *See, e.g.*, S. Rep. 103-3 at 16 (six weeks is the medically recommended pregnancy disability leave period); H.R. Rep. 101-28 at 30 (referring to PDA legislative history establishing 4 to 8 weeks as the medical recovery period for a normal childbirth).

[17] *See, e.g., 1987 Post Office Hearing*, at 2-5 (Rep. Gary Ackerman recounted suffering expressly sex-based denial of unpaid leave of absence where benefit was ostensibly available for "child care leave").

Congress was also aware that state employers' collective bargaining agreements often granted extended "maternity" leave of six months to a year, which also amounted to presumptively unconstitutional women-only parenting leave. Gerald McEntee, President of the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME), testified that "the vast majority of our contracts, even though we look on them with great pride, really cover essentially maternity leave, and not paternity leave." *1987 Senate Labor Hearings*, at 385.[18] Personnel policies of state colleges and universities also reveal a pattern of explicitly sex-based distinctions in parenting leave.[19] Some laws and

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[18] *See, e.g.*, Master Contract Between the State of Rhode Island and AFSCME (1992-1995) (maternity leave without pay "shall be granted for a period of not less than three months nor more than 12 months and may be extended by mutual consent"); 1991-1993 Collective Bargaining Agreement Between State of Iowa and AFSCME (Blue Collar, Clerical, Community Corrections, Professional Fiscal & Staff, Security Technical) (providing for maternity leave of up to one year, medical excuse needed after six months); Agreement Between State of Iowa and AFSCME, Clerical Unit Collective Bargaining Agreement (7/1/85-6/30/87) (Iowa) (same); Agreement Between Development Corporation for Israel (NY) and Community and Social Agency Employees Union (1/1/91-12/31/93) (providing for one year maternity leave); Contract Between the State of Ohio and Ohio Civil Service Employees Assn. (1989-1991) (pregnant employees entitled to unpaid leave for "up to six months after all other paid leave has been used"); Agreement Between the Executive Department of the State of Oregon and AFSCME (1983-1987) (providing maternity leave for "a reasonable period of time not to exceed six months"); Agreement Between University of Minnesota and AFSCME (7/1/83-7/1/85) (providing for up to one year of maternity leave, but only three months of paternity leave); Master Agreement Between Commonwealth of Pennsylvania and Council 13, AFSCME (7/1/83-6/30/85) (providing for up to one year of maternity leave). These collective bargaining agreement provisions are lodged with the Court.

[19] *See, e.g.*, University of Colorado Faculty Handbook, eff. 9/88 ("on request, female members of the faculty will be given maternity leave without pay for a period not to exceed two consecutive semesters."); Kentucky State University 11/1/88 (allows use of sick leave and leave with-

policies even *required* women to take specified periods of time off for maternity purposes, unrelated to the mother's actual maternity disability.[20]

b. Discretionary leave policies and risk of discriminatory application

Congress had evidence that even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways. Before the FMLA, if States granted

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out pay for maternity leave, with no provision for paternity leave); Auburn [Alabama] University Faculty Handbook 1969-70 (maternity leave without pay for up to six months); Westark [Arkansas] Community College Personnel Policy, eff. 9/1/69) (maternity leave of up to a year). The cited policies are lodged with the Court. *See also Danielson v. Board of Higher Education*, 358 F. Supp. 22 (S.D.N.Y. 1972) (state college denied one-year leave to male faculty member planning to stay home and assume the primary responsibility for the care of his infant child, while policy made such leave available to women).

[20] Alabama (Auburn University Faculty Handbook 1969-70) ("[e]xpectant mothers . . . are expected to stop working at least two months prior to the anticipated delivery date and not to return to work for at least a six weeks period following the baby's arrival"); California (Orange Coast College personnel policy 8.36, eff. 1/1/73) ("Employees are encouraged to begin their maternity leave two months prior to the expected date of birth," and may continue to work beyond that point only "upon the recommendation of a licensed California physician."). Utah disqualified women for unemployment compensation for an 18-month period immediately preceding and following childbirth. *See Turner v. Department of Employment Sec. of Utah*, 423 U.S. 44, 45 (1975) (invalidating provision of Utah's unemployment compensation law that "establishes a blanket disqualification during an 18-week period immediately preceding and following childbirth"), *see Schattlman v. Texas Employment Commission*, 459 F. 2d 32 (1972) (sustaining state employer's policy of mandatory resignation of pregnant employees by seventh month of pregnancy). Other state policies similarly reflected overbroad, sex-based generalizations about women's family care role, such as those granting one day to fathers for birth of their own child and providing men no other parenting leave reflected official expectations that men typically would play a minor, even nominal, role in parenting. *See, e.g.*, California (Orange Coast College) personnel policy 8.33, eff. 1975-1976).

family leave at all (*see Brief of Amici Curiae Women's History Scholars Alice Kessler-Harris, Linda Kerber, et al.* Appendix), they ordinarily granted it only on a discretionary, case-by-case basis. Many current state laws continue to grant family medical leave only on a discretionary basis.[21]

Congress was aware that employers making case-by-case leave decisions often acted on sex-based assumptions about the need for leave, the likelihood that the employee could arrange for someone else to provide the care, and the employee's future loyalty to the workforce. Leave policies that permit state employers *discretion* in whether to grant leave, increase the risk of unconstitutional sex-based discrimination, even if the policies may be gender-neutral on their face. Moreover, *ad hoc* practices that do not guarantee sex-neutral leave are also more likely to deter male employees from requesting leave for fear that such a request will undermine their position at work. *Cf. Teamsters v. United States*, 431 U.S. 324, 365-366 (1977).

Congress was well aware that *ad hoc* exercises of employer discretion invited unequal administration. The House Report noted "serious problems with the discretionary nature of family leave," because when "the authority to grant leave and to arrange the length of leave . . . rests with individual supervisors," it leaves "employees open to discretionary and possibly unequal treatment." H.R. Rep. 103-8, pt. 2, at 11. Testimony supported that conclusion, explaining that "[t]he lack of uniform parental and medical leave policies in the work place has created an environment where [sex] discrimi-

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[21] *See, e.g. infra*, App. (identifying 14 state flexible sick leave laws that expressly subject use of sick leave for family care purposes to employer discretion); *see generally* Michelle Lord & Margaret King, *The State Reference Guide to Work-Family Programs for State Employees* (1991), 33 (finding that "[b]y leaving the language vague, the actual interpretation and decision-making responsibility for allowing the use of sick leave in family situations lies with the immediate supervisor or other appointing authority.").

nation is rampant." *1987 Senate Labor Hearing*, at 170 (Testimony of Peggy Montes, Mayor's Commission on Women's Affairs, City of Chicago).

Knussman v. Maryland, 272 F.3d 625 (4th Cir. 2001) vividly illustrates that this problem continues. Although a Maryland statute authorizes employees to use sick leave for purposes of nurturing a new child in sex-neutral terms, state officials denied primary care-giver leave to Maryland State Trooper Harold Knussman following his child's birth and when his wife was very ill. The State's manager of medical leave and benefits told Knussman that "God made women to have babies and, unless he could have a baby, there is no way [he] could be primary care [giver]" eligible for the full amount of child care leave, and that his wife would have had to be "in a coma or dead" for Knussman himself to qualify as primary. *Id.* As *Knussman* dramatically demonstrates, family leave policies that grant employers broad discretion continue to invite discrimination based on "traditional ideas about a woman's role in rearing a child." *Id.* at 639.[22] Congress plainly had a basis for concluding that a nondiscretionary federal guarantee was warranted.

[22] Other cases provide additional glimpses into discretionary decision making contaminated by sex discrimination. In *Scevers v. Employment Div.*, 554 P.2d 575 (Or. App. 1976), for example, the Oregon State Employment Appeals Board denied unemployment benefits to a father who was fired for taking two days off to care for his children recovering from measles. The employer testified that "[i]f . . . it was a situation where his wife couldn't take care of the family and it was his obligation to take care of sick children—that it [sic] didn't fit into our permanent plans . . . Generally, the man of the household gets to work." *Id.* at 576. The state treated the absence as "misconduct" disqualifying him from unemployment compensation "only because he was the father of the children and not the mother." *Id.* at 577 (Schwab, J., concurring).

3. Sex discrimination in employment due to stereotypes about family roles

Congress also sought to addresses sex discrimination based on employers' assumptions *ex ante* about women's *potential* family responsibilities. Such discrimination has long been unconstitutional and prohibited under Title VII. States, like public and private employers across the economy, however, continued to deny women jobs and promotions based on generalizations about women's family roles.[23]

[23] *See, e.g.*, *Moore v. Alabama State Univ.*, 980 F. Supp. 426, 431 (M.D. Ala. 1997) (vice president in charge of hiring said he believed that a woman should stay home with her children and that he would not put a married woman in admissions director job, and refused to promote a qualified woman with 14 years of experience once she got pregnant, stating "I was going to put you in charge of that office, but look at you now."); *Arkin v. Oregon*, No. 6:96CV6327 (D. Or. filed Dec. 19, 1996) (alleging tenure denial caused by having taken maternity leave); *Graff v. Eaton*, 60 FEP Cases 990 (Vt. S. Ct. 1991) (state employer denied woman a flextime schedule because he feared that if he granted it, "every female state employee with small children would also want a flextime schedule"); *Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm'n*, 322 N.W.2d 293 (Iowa 1982) (state fired woman for taking leave after it denied her use of comp time because state suspected her but not male coworkers in similar circumstances of trying to avoid the midnight shift); *Bruno v. City of Crown Point*, 950 F. 2d 355, 366 (7th Cir. 1991) (female paramedic applicant denied EMS position after interviewer asked her questions he did not ask male applicants about how many children she had, her child care arrangements, whether it was "time to have more children," and how her husband would feel about her working 24-hour shifts); *Barbano v. Madison County*, 47 FEP Cases (BNA) 1872 (N.D.N.Y. 1988) (female applicant denied directorship of veterans' service agency after interviewers asked her whether she had plans to have a family and, when she objected that the questions were not relevant, insisted that they "did not want to hire a woman who would get pregnant and quit"); *Stukey v. United States Air Force*, 790 F. Supp. 165 (S.D. Ohio 1992) (female Air Force Attorney-Advisor denied promotion after selecting officials asked her questions it did not ask of male applicants involving, *inter alia*, her marital status and child care arrangements); *Horvath v. U.S. Dep't of Navy*, Federal Equal Opportunity Reporter, (1981) (interviewer asks woman applicant questions not asked of men

Congress heard testimony regarding such discrimination from people with substantial relevant experience.[24] This well

about how many children she had, her babysitting plans, and willingness to work nights and holidays); *Dep't of Fair Employment & Housing v. Flamingo Resort Hotel*, No. 92-03, 1992 WL 223889 at *7 (Cal. F.E.H.C. 1992) (female employee demoted after returning from maternity leave by employer "motivated by the classic sex stereotype that working women with children will inevitably bear most of the parent responsibility and that this will interfere with their work, particularly if it is demanding managerial work."); *King v. Trans World Airlines*, 738 F. 2d 255 (8th Cir. 1984) (interviewer had asked unsuccessful female applicant for kitchen helper job questions not asked of males regarding how many children she had, planned to have and what her childcare plans were); *Goss v. Exxon Office Sys. Co.*, 33 FEP Cases 21 (E.D. Pa. 1983) (manager questioned high-performing woman sales representative about her plans to have a family, responded skeptically to her plans to combine motherhood and career, commented that she was only interested in having children and was not interested in her career, and moved her to inferior territory because of his disapproval of working mothers); *EEOC v. Spokane Concrete Prods.*, 534 F. Supp. 518 (E.D. Wash. 1982) (interviewer for firm that had never hired a woman truck driver asked female applicant questions it did not ask males about her transportation and child care plans); *Anderson v. Hunter, Keith, Marshall & Co.*, 401 N.W.2d 75 (Minn. 1987) (female secretary planning to return to work after maternity leave was fired while on leave "because of problems employers have with mothers who decide not to return to work from their leaves of absence," but "to spare her feelings" employer falsely told outsiders that secretary had quit to stay home and care for her family). Each of these plaintiffs was alerted to the sex discrimination they confronted by the employers' overt statements; legions of others have no doubt experienced similar discrimination without any way to verify that it was happening.

[24] *See The Family and Medical Leave Act of 1987: Joint Hearings Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the House Comm. on Educ. and Labor*, 100th Cong., 1st Sess. 235 (1987) (statement of Donna Lenhoff, Associate Director for Legal Policy and Programs, Women's Legal Defense Fund) (testifying that employers still operated under the traditional assumptions that, where work and family conflict, "women's role is to stay home and care for the family and men's role is to work outside the home for a paycheck."); H.R. Rep. 99-699, pt. 1, at 10 (1986); *1986 House Joint Hearing*, at 100 (Women's Legal Defense Fund) ("Historically,

documented discrimination provides a basis for the FMLA's guaranteed sex-neutral right to family leave.

4. Inadequacy of case-by-case litigation to solve the problem

As this Court has noted, Section 5 legislation is needed precisely where "case-by-case litigation [is] inadequate to combat widespread and persistent discrimination." *South Carolina*, 383 U.S. at 328, *Boerne*, 521 U.S. at 526.

That is plainly the case here. The very pervasiveness of the generalization that women have primary responsibility for family care leads many employees to fail to recognize the unconstitutionality of reliance on them. Moreover, men may avoid suing to challenge leave offered only to women due to the risk that, instead of extending the benefits to them, employers will clarify or change their policies to deny them to both sexes.[25] Where sex infects discretionary decisions, the

denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be."); *Family and Medical Leave Act of 1989: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 200 (Statement of Patricia Ashley, Methodist Hospital of Indiana) (witness on behalf of the American Society for Personnel Administration explained that she had worked as a personnel officer with principal hiring authority, and observed that "there are very subtle ways of discriminating against women . . . in a capacity to hire people, I saw it daily, I saw it hourly."); *1987 Post Office Hearing*, at 36 (testimony reporting comment of President of Merchants and Manufacturers Association that Court's *CalFed* decision, would trigger employment discrimination against women based on assumptions regarding their future leave use, and that although "that is illegal, . . . try to prove it."); *1989 House Labor Hearing*, at 196 (Personnel Manager testified: "I can assure you that subtle discrimination is still there, particularly for women who have children . . . targeted at women, not at fathers.").

[25] *See, e.g., Chafee v. Teachers' Pension & Annuity Fund*, 457 A.2d 33, 36 (N.J. Super. 1983) (when male employee challenged practice of

bases for those decisions are often not sufficiently visible to make employees aware that they have been subjected to discrimination. Even if an employee learns that a co-worker took time off to care for a sick relative, he will not ordinarily know the terms on which the leave was granted, and thus whether his own circumstances are comparable. That problem is even more acute where employers deny women jobs or promotions based on assumptions about their future leave needs, given that applicants and employees are seldom privy to the considerations that affect such decisions.

5. Inadequacy of state leave laws

Finally, Congress had a basis for concluding that existing state family leave protections were insufficient to address the discrimination problems that the FMLA targets.[26] It was only "since Federal family leave legislation was first introduced" that the States had even "begun to consider similar family leave initiatives." S. Rep. 103-3 at 20; *see also* S. Rep. 102-68 at 77 (minority views of Sen. Durenberger) ("so few states have elected to enact similar legislation at the state level"). *See Brief of Amici Curiae Women's History Scholars Alice Kessler-Harris, Linda Kerber, et al.* Appendix. Most leaves available under state law were not job-protected, and, as Hibbs' own experience with NCL leave illustrates, left to the employer's discretion whether employees could actually take leave when they needed it. The deficiencies of

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state board permitting only women on parenting leave to purchase pension credits, the state conceded that women on child care leaves may "on occasion" have received the benefit, but interpreted the law to foreclose any future purchase of pension credits by employees for purposes of child care leave.); *see generally Heckler v. Mathews*, 465 U.S. 728, 740 (1984) (equal protection violations can be remedied "by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.").

[26] S. Rep. 103-3 at 4 ("government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family").

the family and medical leave laws of the 13 *amici* states supporting Petitioners illustrate those inadequacies. Of the 13, five (Alabama, Delaware, Indiana, Nebraska, and Virginia)[27] have no comparable family and medical leave law whatsoever.[28] Of the remaining eight, two states that do have family and medical leave laws, two (South Carolina and Tennessee) do not provide job protection,[29] and two (Ohio and Tennessee) fail to provide leave that covers all of the uses provided by the FMLA.[30] Petitioner Nevada's leave law likewise falls short of the FMLA guidelines for job protection.[31] The Senate committee concluded that "it is critical to distinguish between a policy that provides job-guaranteed leave to all workers, as opposed to a case-by-case approach where an employer may or may not grant leave when requested." S. Rep. 102-68 at 35. *See also* S. Rep. 103-3 at 17 ("[E]ven though many employers already have some sort of leave pol-

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[27] Virginia does expressly allow four to five paid days per year of "family and personal leave." Va. Code Ann. § 51:1-1107.

[28] In addition, Michigan, Missouri, Mississippi, New York, and Pennsylvania have no comparable leave laws.

[29] *See* 19 S.C. Code Ann. Regs. 712.01; Tenn. Code Ann. § 4-21-408; Nev. Rev. Stat. 284-360. A number of additional States with leave laws provide no job protection: Iowa (Iowa Admin. Code r. 581-14.4(19A)), North Carolina (N.C. Admin. Code tit. 25, r. 1E.1402 *et seq.*), South Dakota (S.D. Admin. R. 55:01:22:08:02)), and West Virginia (W.Va. Code § 21-5D-4)).

[30] *See* Ohio Rev. Code Ann. § 124.126 (providing only parental leave upon the birth or adoption of a child); Tenn. Code Ann. § 4-21-408 (providing only maternity leave for female employees); Tenn. Code Ann. § 8-50-806 (allowing use of sick leave only for adoptive parents). Many other states providing some type of leave fall short of the FMLA. Louisiana provides only pregnancy disability leave (La. Rev. Stat. Ann. 23:341-342), Minnesota fails to provide family leave (Minn. Stat. § 181.940-942), Montana provides only pregnancy leave (Mont. Code Ann. § 49-2-310 et seq.), and New Hampshire provides only pregnancy leave (N.H. Rev. Stat. Ann. § 354-A:7).

[31] *See* Nev. Rev. Stat. 284.360.

icy, legislation is necessary to ensure that workers receive basic guarantees of job security and continued health insurance coverage.").

Petitioners point to the availability in some States of flexible sick leave policies that allowed employees to use their sick leave to care not only for themselves, but also to care for family members. Pet. Br. 4-S; *Amici Br.* of Alabama *et al.*, 9-14. But Congress specifically found that sick leave "offers little security to employees if employers do not guarantee some minimum length of leave." S. Rep. 103-3 at 15. Many States allowed very few sick leave days to be used for family care, with the most common cap being five days. *See infra* App. Almost every State limits annual accrual of such leave, most commonly to 12 days. Most importantly, such leave is rarely non-discretionary or job-protected. *Id.* (Only four States offer job protections for employees using flexible sick leave, and at least 14 expressly subject such leave to employer discretion). *See infra* App. As explained below, features of FMLA leave are critical to counteracting discrimination based on stereotypes that skew the exercise of discretion.

In sum, the extensive public record of past and current state sex discrimination at the work-and-family fault line, the continuing effects of the stereotypes that such discrimination fostered, and the inadequacy of case-by-case discrimination litigation and insufficiency of state leave laws provided ample basis for Congress to act under Section 5.

E. The FMLA Is A Congruent And Proportional Response To The Intractable National Problem Of Unconstitutional Employment Discrimination Flowing From Stereotypes About Women's Primary Responsibility For Family Care.

The FMLA is a modest, fitting response to the continuing effects of past unconstitutional discrimination by States, as well as to the realities and risks of present sex discrimination. The Act seeks to counteract the pernicious effects of

sex-role stereotyping by assuring that all employees, male and female, have a right to take unpaid leave when needed.

This Court's requirement that any Section 5 remedy be congruent and proportional to the unconstitutionality at which it aims is designed to assure that Congress legislates in accordance with the Court's interpretation of the relevant constitutional right, and does not substantively redefine the right. *See Kimel*, at 81; *Boerne*, at 520. The standard asks whether the contours of the statutory right are drawn in a way that is appropriately related to the underlying constitutional right it seeks to enforce (congruence); and whether the scope of its applicability accords with the scope and gravity of the targeted unconstitutional conduct (proportionality). As discussed above, *see supra*, Point I.A., the fact that Congress was targeting sex discrimination should lead the Court to apply the congruence and proportionality requirement with deference to Congress's choice of remedial means under Section 5: when Congress is addressing discrimination whose existence is established by "volumes of history" and for that reason subject to elevated scrutiny, there is little danger that Congress is redefining the scope of the Fourteenth Amendment.

The FMLA indisputably prohibits some conduct that Article 1 of the Fourteenth Amendment alone does not. There is also no dispute, however, that in enforcing the Equal Protection Clause, Congress may prohibit conduct that this Court's equal protection precedents do not themselves bar. Indeed, a statute can "prohibit very little conduct likely to be held unconstitutional" and still pass muster under this Court's Section 5 review. *Kimel*, 528 U.S. at 88. Congress "is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment," but may prohibit "a somewhat broader swath of conduct, including that which is not itself prohibited by the Amendment's text," *Kimel*, 528 U.S. at 81; *see Garrett*, 531 U.S. at 365, so long as the legislation is congruent and proportional to targeted unconstitutional discrimination.

1. The FMLA is congruent.

The FMLA closely fits Congress's goal of eliminating sex discrimination in employment caused by sex stereotypes about family roles. By granting a right to a *threshold amount* of unpaid family leave, the FMLA works to cure the disproportionate harm to working women from no-leave policies. At the same time, the FMLA's grant of family leave on sex-neutral grounds was also needed to override policies and practices that extended leave to women and not to men. *See* point I.D.2.a., *supra*. The choice of a 12-week ceiling on FMLA leave applicable only to employers with 50 or more employees was carefully drawn with substantial input from many quarters, including public and private employers, to ensure that it would not impose significant burdens on employers while still providing meaningful, job-protected leave to employees.[32] Although Congress's decision to provide only a relatively short period of unpaid

[32] Congress noted evidence that granting such unpaid leave would result in cost savings from decreased turnover, hiring and training of replacements, and that the net cost to employers of providing job-protected unpaid leave could be as inexpensive as $5.30 to $6.70 per employee per year. *See* S. Rep. 103-3, at 16-18 (1993); *The Family and Medical Leave Act of 1991: Hearing on S. 5 Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*, 102d Cong., 1st Sess. 12, 13, 23, 35, 91 (1991); *see also* S. Rep. 103-3, at 14 (describing survey of a handful of States that did have family and medical leave laws, which revealed that "sizable majorities of covered employers reported that the state laws were neither costly nor burdensome to implement."). That kind of empirically based judgment in the fashioning of legislative remedies is particularly within congressional competence and is entitled to deference. *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n. 12 (1985). The congressionally mandated follow-up study on experience with the FMLA reported that the vast majority of employers in fact experienced little or no cost from FMLA compliance. Commission on Leave, United States Department of Labor, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 125-26 (1996); *see also Balancing the Needs of Families and Employers, Family and Medical Leave Surveys*, 6-13 (2000 Update).

only a relatively short period of unpaid leave disappointed some advocates, it underscores the FMLA's congruence as a remedy for sex discrimination. To the extent that States might still assume that women are more likely than men to take advantage of the FMLA, limiting the burdens that the leave requirement imposed on employers was an important aspect of preventing the Act from having the perverse effect of enhancing *ex ante* sex discrimination.[33]

Congress's decision to provide *sex-neutral* leave is also congruent to its goal of eliminating sex discrimination in this area. Congress feared that providing family leave rights to women only would "have serious potential for encouraging employers to discriminate" against them. 29 U.S.C. § 2601(a)(6). The FMLA's sex-neutrality sends the important message that families must be free to make their own decisions about which family member—male or female—will perform care-taking duties. "We know that . . . gender matters" in family-care choices at least as much as it does in jury voting patterns, *see J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994) (O'Connor, J., concurring). By making family leave available on sex-neutral terms separately to each individual parent rather than to the family unit, the FMLA helps to prohibit consideration of sex in family leave decisions, and to promote the view that men and women have equal potential at home and at work. That has the secondary benefit of eroding the basis for employers' harmful, sex-stereotyped association between employees' gender and their likely family leave needs - associations that have caused sex discrimination at hiring and promotion stages. The *non-*

[33] Contrary to petitioner's suggestion that the 12-week period was selected based on children's developmental needs, Representative Roukema, a key sponsor of the legislation, testified that parent-child bonding could not be considered a justification for such a short leave period, and that consideration instead should "evolve around other issues, economic, social welfare in terms of women's rights, and the disability aspects of maternal leave." 1986 House Joint Hearing, at 48.

discretionary character of FMLA leave is congruent to the identified risk of exercises of discretion tainted by stereotypes. *See supra*, point I.D.2.b. And the FMLA's *job-protection* provisions respond directly to the problem that leave rights become illusory when employees are deterred from taking them out of fear for their jobs.[34]

2. The FMLA is proportional.

The FMLA's grant of family leave, and its provision for damages suits against States, is also proportional to Congress's goal of remedying the unconstitutional discrimination it targets.

Awards of damages under the FMLA are virtually always modest, but the ability of employees to sue for damages is critically important to the practical effectiveness of the Act. Without any risk of liability for back pay, States could violate the FMLA with impunity. A State could defer reinstatement for many months, such as Nevada has done in Hibbs' case, place the employee in a different, inferior position, or terminate needed insurance coverage of an employee on FMLA leave without increasing its exposure under the Act. A State could entirely ignore the claims of an unlawfully terminated employee unless and until the employee filed suit seeking reinstatement. The importance of private actions for damages as an enforcement mechanism is a classic subject of congressional expertise, to which this Court should grant deference.

The FMLA defines damages restrictively. Employees are entitled *either* to back pay *or* compensation for other actual monetary losses, but not both. 29 U.S.C. § 2617 (a)(1)(A)(i). Actual damages, where available, are conservatively capped at "a sum equal to 12 weeks of wages or salary

[34] *1987 Post Office Hearing* at 33 ("The most immediate cost, the greatest hardship of the legislative vacuum is that working women and men not infrequently lose their jobs when they need to take family or medical leave.").

for the employee." 29 U.S.C. § 2617(a)(1)(A)(i)(II). Similarly, the FMLA is attentive to the public fisc in not authorizing punitive or treble damages, but limiting liquidated damages to a doubling of the compensatory award, and permitting them only where employers act in bad faith and lack reasonable grounds for believing their actions were lawful. 29 U.S.C. § 2617(a)(1)(iii). A State's potential overall damages exposure, even assuming it acted unreasonably or in bad faith, is thus capped at twice the employee's salary for a 12-week period.

Private-sector employers' experience with FMLA damage awards is illustrative. The vast majority of reported FMLA cases to date have not involved any damages. Out of 1,072 FMLA opinions we located,[35] only 31 awarded any damages. In the 25 such cases in which dollar amounts were reflected in the opinions, the mean award was $ 40,000. All but six of the 31 damages cases involved denials of leave under 2612(a)(1)(D), the personal medical leave provision not at issue here. Available information thus suggests that damages exposure for denial of family leave, while an important deterrent and remedy, is not imposing significant burdens on employers.

The FMLA is further tailored to minimize intrusions on employers and respect state sovereignty. For example, the Act expressly excludes from coverage States' elected officials, their staffs, and appointed policy makers. 29 U.S.C. § 2611(3) (incorporating FLSA definition of "employee"). It also permits States to deny restoration of an employee to his or her previous position if "such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer." 29 U.S.C. § 2614(b)(1)(A); 29 C.F.R. 825.216(c). The FMLA does not preempt states

[35] In order to eliminate cases with only a passing reference to the FMLA, we reviewed all decisions appearing in LEXIS federal databases that mentioned "FMLA" at least six times.

from maintaining their own leave programs, 29 U.S.C. § 2651(b), and, if a State gives proper notice, it can require its employees to count time taken under the State's leave programs against the 12-week allotment of FMLA leave. 29 U.S.C. § 2612(d)(2); 29 C.F.R. §§ 825.207, 825.208(a), 825.301(c).

Unlike the ADA and the ADEA, the FMLA applies only to a single form of employment practice, and uses a clear, readily administrable standard. It is also in contrast to the RFRA, which had "sweeping coverage ensur[ing] its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter," *Boerne*, 521 U.S. at 532, and which applied a "substantial burden" threshold test that was highly contextual and "difficult to contest," *id.* at 533-534.

Because the discrimination and stereotypes it targeted were not limited to particular geographic areas, Congress acted appropriately in adopting a nationally uniform statute. Contrary to petitioners' suggestions, Pet. Br. at 15-16, 22-23, Section 5 legislation does not "require . . . geographic restrictions." *Boerne*, 521 U.S. at 533. Indeed, even though more than 30 states lacked literacy requirements at the time, the Voting Rights Act's prohibition of English literacy requirements applied nationwide. *Morgan*, 384 U.S. at 643 n.1, 654 n.15. Unlike some of the forms of racial discrimination in voting addressed through geographically focused provisions of the Voting Rights Act, *see South Carolina v. Katzenbach*, 383 U.S. 301, the sex discrimination that the FMLA targets is not a regional phenomenon. The evidence instead reflects sex-based laws, policies, attitudes and practices that long pervaded our national culture, and play a continuing role throughout the nation to this day.

II. THE FMLA'S PRIVATE DAMAGES REMEDY IS APPROPRIATE SECTION 5 LEGISLATION AS APPLIED TO NEVADA'S UNCONSTITUTIONAL RETALIATION AGAINST HIBBS' ASSERTION OF FMLA RIGHTS.

Leaving aside whether there is a private right of action for retrospective relief against States under FMLA Section 2612(a)(1)(C) generally, the decision below may be affirmed on the narrower, independent ground that the FMLA is constitutional as applied to Hibbs' retaliation claim. In revoking Hibbs' state NCL leave in response to his disputing Nevada's interpretation of the FMLA, respondents violated not only 29 U.S.C. § 2615(a)(2) (barring adverse action against anyone "for opposing any practice made unlawful" by the FMLA), but also violated Hibbs' constitutional right as a public employee to assert a federally protected right and to express himself in a nondisruptive manner on a matter of public concern. Hibbs' case is squarely distinguishable on this ground from the Court's other recent precedents, none of which involved a claim that the specific state conduct at issue was itself unconstitutional.[36] Because application of the FMLA damages remedy to the State is, at a minimum, constitutional as applied against state action that is itself unconstitutional, the FMLA's damages remedy is appropriate here without regard to whether it also appropriately extends to constitutionally valid state conduct. *See* Point I. The Court should thus

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[36] *See Garrett*, 531 U.S. at 362 (challenging failures to accommodate leave request of one plaintiff undergoing chemotherapy, and changes to shift or duties requested by other plaintiff to relieve asthma and sleep apnea); *Kimel*, 528 U.S. at 69-71 (no suggestion in facts of irrational or invidious age-based actions that would violate equal protection); *Florida Prepaid*, 527 U.S. at 643 (no due process violation even if State infringed patent because Florida law provides a state-law remedy); *Boerne*, 521 U.S. at 511-12 (denial of church's application for building permit under neutral, generally applicable law did not violate free exercise of religion). *But see Florida Prepaid*, 527 U.S. at 653-54 (Stevens, J., dissenting).

affirm on this ground, or at least remand the case for consideration of this narrower theory, which the court of appeals did not find necessary to decide given that court's validation of Section 2612(a)(1)(C) in its entirety.

Congress unquestionably has authority under Section 5 to authorize a private right of action for state action that violates the Constitution. *See, e.g.*, *Ex Parte Virginia*, 100 U.S. (10 Otto) 339 (1879); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). To overcome a state sovereign immunity defense in these circumstances, a plaintiff need not make the showings of a pattern of predicate unconstitutional actions or of congruence and proportionality that the Court has required in cases of constitutionally permissible state action falling within statutory buffer zones. A clear statement of congressional intent to abrogate suffices. *See Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). It is only when Congress prohibits otherwise constitutionally valid conduct and the claim falls in the statutory buffer zone that this Court's precedents require predicate patterns of unconstitutionality and congruence and proportionality. *Garrett*, 531 U.S. at 365 (Section 5 legislation "reaching beyond the scope of § 1's actual guarantees must exhibit" congruence and proportionality"); *Boerne*, 521 U.S. at 530 ("preventive rules" require a showing of congruence and proportionality); *see Kimen v. New Hampshire Department of Corrections*, 301 F. 3d 13 (1st Cir. 2002).

Hibbs presented sufficient evidence supporting his retaliation claim to meet the evidentiary threshold applicable at the summary judgment stage. Hibbs first voiced to petitioners his objection to their misinterpretation of the FMLA on November 3, 1997, and two days later, on November 5, they made an abrupt about-face, not only retroactively revoking his FMLA leave, but also revoking their initial approval of Hibbs' request for renewed Nevada catastrophic leave. The very next day petitioners for the first time threatened disciplinary action if Hibbs did not return to work. This sequence of events raises an inference of retaliatory motive on petitioners' part that a factfinder would be permitted to credit.

See Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) (close temporal proximity between employer's awareness of protected activity and adverse employment action can give rise to an inference of retaliatory motive).

Because Hibbs alleges that he was subjected to unconstitutional state conduct, there is no warrant for the broad review and facial invalidation of the FMLA that Nevada requests. Absent First Amendment overbreadth claims, this Court will not strike down a statute on its face unless the statute is unconstitutional as applied to the party seeking its invalidation. *See United States v. Raines*, 362 U.S. 17, 21 (1960). Because Section 2612(a)(1)(C), as implemented through the FMLA's anti-retaliation provision, 2615(a)(2), is constitutionally valid as applied to Nevada in this case, the State lacks standing to seek its facial invalidation. Moreover, in mounting a facial challenge, Nevada would have to "establish that no set of circumstances exists under which the Act would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987). "[T]he fact that the [statute in question] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Id.*; *see also INS v. Nat'l Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991) (fact "[t]hat the regulation may be invalid as applied in [particular] cases . . . does not mean that the regulation is facially invalid"). Because at a minimum the FMLA validly provides a remedy against Nevada's unconstitutional retaliation, the Court should reject petitioners' facial challenge.

The FMLA's damages remedy for retaliation is appropriate as applied to enforce Hibbs' constitutional rights. State retaliation for the mere assertion of an admittedly federally protected right is wholly arbitrary and "shocks the conscience" *Rochin v. California*, 342 U.S. 165, 172 (1952). *See Garrett*, 531 U.S. at 376 (Kennedy, J., concurring) (emphasizing that what is at issue is not the right, but the remedy). In addition, retaliation against public employees for nondis-

ruptive speech on matters of public concern violates the First Amendment. *Pickering v. Board of Educ.*, 391 U.S. 563, 573-74 (1968); *Connick v. Myers*, 461 U.S. 138, 154 (1983). Even employee speech that is motivated by a desire to defeat adverse employment action may still address matters of public concern. *See Connick*, 461 U.S. at 141, 150. The fact that Hibbs asserted his rights privately does not defeat this claim. First Amendment protection "is [not] lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979); *see Rankin v. McPherson*, 483 U.S. 378, 386 n.11 (1987) (same); *Connick*, 461 U.S. at 152-54.[37] Here, just as in *Givhan*, what is at stake is an employee assertion, made privately to a supervisor in the context of a disputed personnel action, that an employer was violating important federal rights. Hibbs' statements are matters of public concern under this Court's precedents.[38]

CONCLUSION

The judgment of the Court of Appeals should be affirmed, and the case remanded for further proceedings.

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[37] Opposition to practices that the FMLA makes unlawful as a matter of federal civil rights law is more than mere "complaint about a change in the employee's own duties," *United States v. National Treasury Employees Union*, 513 U.S. 454, 466 (1995), or garden-variety "criticism directed at a public official," *Connick*, 461 U.S. at 149.

[38] Petitioners mischaracterize the issue and the Ninth Circuit's precedent upon which they rely when they argue that there can be no retaliation claim where there is no underlying private right of action. *See* Reply Brief for Petitioners at 8 (petition stage). Even assuming that sovereign immunity bars a private right of action against Nevada for denying leave under 2612(a)(1)(C), petitioners concede, as they must, that state employees still have a federal right to such leave. When such leave reasonably appears to have been unlawfully denied and a state employee exercises his right to voice opposition to the denial, Congress's clear authorization of a private right of action validly abrogates sovereign immunity as applied to such a constitutional claim.

Respectfully submitted,

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APPENDIX

CURRENT STATE FLEXIBLE SICK LEAVE LAWS

STATE	Maximum Use Per Year	Accrual Limits Per Year	Expressly Subject to Employer Discretion	Non-covered*
AL		12 days	Y	P
AK		24 days	Y	--
AZ	5 days	12 days**	Y	P
AR		12 days	Y	P
CA	5 days	12 days	N	P
CO		10 days	N	P
CT	3 days	15 days	N	PD, P
DE		--	N	FM, CM
DC		--	N	--
FL	6 days	13 days**	N	P
GA		15 days**	Y	PD, P
HI	**NO FLEXIBLE SICK LEAVE LAW**			
ID		12 days	N	P
IL		12 days	N	P

* CM = Child Medical; FM = Family Medical; P = Parental; PD = Pregnancy Disability

** Separate sick leave provision for part-time employees. See accompanying text, *infra*.

STATE	Maximum Use Per Year	Accrual Limits Per Year	Expressly Subject to Employer Discretion	Non-covered*
IN		9 days**	N	PD, P
IA	5 days	18 days**	Y	P
KS		12 days	N	--
KY		12 days**	N	P (excl.: school empl.)
LA	NO FLEXIBLE SICK LEAVE LAW			
ME		12 days	Y	PD, P
MD		15 days	N	--
MA		15 days	Y	--
MI		12 days	Y	P
MN		--	N	FM, PD, P
MS		18 days	N	PD, P
MO		15 days	Y	P
MT		12 days	N	--
NE		12 days	N	P
NV	15 days	15 days	N	P

* CM = Child Medical; FM = Family Medical; P = Parental; PD = Pregnancy Disability

** Separate sick leave provision for part-time employees. See accompanying text, *infra*.

STATE	Maximum Use Per Year	Accrual Limits Per Year	Expressly Subject to Employer Discretion	Non-covered*
NH	5 days	15 days	N	P
NJ	Reas. Pd.	12 days**	N	P
NM		11 days**	N	P
NY	15 days	12 days**	Y	P
NC		12 days**	N	--
ND	5 days	12 days	N	PD, P
OH		9.3 days	Y	P
OK		15 days	N	--
OR		Personnel Division	N	FM, CM, PD
PA	5 days	13 days	N	PD, P
RI	10 days	14 days**	N	--
SC	8 days	15 days	N	P (excl.: adopt p's)
SD	5 days	14 days	N	P
TN		12 days	Y	--
TX		12 days**	N	P

* CM = Child Medical; FM = Family Medical; P = Parental; PD = Pregnancy Disability

** Separate sick leave provision for part-time employees. See accompanying text, *infra*.

STATE	Maximum Use Per Year	Accrual Limits Per Year	Expressly Subject to Employer Discretion	Non-covered*
UT		12 days	N	--
VT	NO FLEXIBLE SICK LEAVE LAW			
VA		4 days	N	--
WA	5 days	12 days	N	--
WV	5 days	18 days**	N	P
WI	5 days per illness	15 days	N	P
WY		12 days	Y	P

* CM = Child Medical; FM = Family Medical; P = Parental; PD = Pregnancy Disability

** Separate sick leave provision for part-time employees. See accompanying text, *infra*.

CURRENT STATE FLEXIBLE SICK LEAVE LAWS

ALABAMA

- ACCRUAL LIMITS

  ALA. ADMIN. CODE r. 670-X14-.01(1) (2001) ("An allowance of four hours for each bi-weekly period of service shall be made for sick leave. Unused portions of such allowance may accumulate but not to exceed a maximum of 150 days").

- EXPRESSLY SUBJECT TO DISCRETION

  ALA. ADMIN. CODE r. 670-X14-.01(1)(b)(3), (1)(c) (2001) ("Sick leave is hereby defined to mean absence from duty of an employee because of: attendance upon members of the immediate family whose illness requires the care of such employee"); ("Sick leave with pay is not a right for which employees may make demand, but a privilege granted in accordance with prescribed rules and regulations, to which the Board may make exceptions as the best interest of the service demand.").

ALASKA

- ACCRUAL LIMITS

  ALASKA STAT. § 39.20.200(a)(1)-(4) (Michie 2001) ("Officers and employees of the state are entitled to personal leave with pay that accrues as follows: (1) two days for each full monthly pay period in the case of officers and employees with less than two years of service; (2) two and one-quarter days for each full monthly pay period in the case of officers and employees with two but less than five years of service; (3) two and one-half days for each full monthly pay period in the case of officers and employees with five but less than ten years of service; (4) three days for each full monthly pay

period in the case of officers and employees with 10 years or more of service.").

- **EXPRESSLY SUBJECT TO DISCRETION**

  ALASKA STAT. § 39.20.225(b) (Michie 2001) ("An officer or employee may take personal leave for medical reasons, regardless of whether business permits, upon permission by the head of the department or agency for which the officer or employee works. A department or agency head shall grant personal leave for medical reasons if the department or agency head is satisfied that the officer or employee is absent for medical reasons. The taking of personal leave for medical reasons shall be reduced by the amount of wage continuation payments under AS 23.30 (Alaska Workers' Compensation Act). The following constitute 'medical reasons' and are subject to the conditions noted: ... (2) medical disability of a member of an officer's or employee's immediate family is a medical reason for taking personal leave if the disability is such that the attendance of the officer or employee is required.").

ARIZONA

- **MAXIMUM USE**

  ARIZ. ADMIN. CODE R2-5-404(A)(4) (2002) ("Sick leave is any approved period of paid absence granted an employee due to ... Illness, injury, examination, or treatment by a licensed health care practitioner of an employee's spouse, dependent child, or parent. For purposes of this Section, the term 'dependent child' is defined as a natural child, an adopted child, a foster child, or a step child, over 1/2 of whose support is received from the employee. The term 'parent' is defined as a birth parent, adoptive parent, stepparent, grandparent, parent-in-law, or anyone who can be considered 'in loco

parentis', i.e., someone who assumed the responsibility of a parent. Sick leave granted for this purpose [(to care for spouse, dependent child, or parent)], shall be charged to the employee's sick leave account and shall not exceed 40 hours per calendar year.").

- **ACCRUAL LIMITS**

  ARIZ. ADMIN. CODE R2-5-404(B)(1), (2) (2002) ("All state service employees, except seasonal, temporary, emergency clerical pool, and part-time employees, shall accrue sick leave at a rate of 8 hours per month."), ("Part-time employees who work ¼ time, ½ time, or ¾ time will accrue a proportional amount of sick leave. Part time employees who work a percentage of full-time other than ¼ time, ½ time, or ¾ time will accrue sick leave at the next lower rate.").

- **EXPRESSLY SUBJECT TO DISCRETION**

  ARIZ. ADMIN. CODE R2-5-404(a)(4), (D)(1) (2002) ("Sick leave is any approved period of paid absence granted an employee due to ... Illness, injury, examination, or treatment by a licensed health care practitioner of an employee's spouse, dependent child, or parent."); ("Sick leave may be taken when approved by the agency head.").

ARKANSAS

- **ACCRUAL LIMITS**

  ARK. CODE ANN. § 21-4-207(a) (Michie 2001) ("Each permanent or probationary employee shall be entitled to sick leave with full pay computed on the basis of one (1) day for each complete month of service including the probationary period.").

- **EXPRESSLY SUBJECT TO DISCRETION**

  ARK. CODE ANN. § 21-4-206(b) (Michie 2001) ("Sick leave may also be granted employees due to

a death or serious illness of a member of the employee's immediate family. For the purposes of this subsection, 'immediate family' shall mean the father, mother, sister, brother, husband, wife, child, grandmother, grandfather, in-laws, or any individual acting as parent or guardian of an employee.").

CALIFORNIA

- **MAXIMUM USE**

  CAL. CODE REGS. tit. 2, § 599.745(d) (2002) (" 'Sick leave' means the necessary absence from duty of an employee because of: Required attendance, not to exceed five days in any calendar year, upon the employee's ill or injured mother, father, husband, wife, son, daughter, brother or sister, or any person residing in the immediate household of the employee except servants, roomers, or roommates.").

- **ACCRUAL LIMITS**

  CAL. CODE REGS. tit. 2, § 599.746 (2002) ("On the first day of the monthly pay period following completion of each monthly pay period of continuous service as defined in Section 599.608, each full-time employee in the state civil service shall be allowed one day of credit for sick leave with pay.").

COLORADO

- **ACCRUAL LIMITS**

  4 CO. CODE REGS. § 801, P 5-11 (2002) (6.66 Hours per month)

CONNECTICUT

- **MAXIMUM USE**

  CONN. AGENCIES REGS. § 5-247-4(a)(3) (2002) ("An eligible employee shall be granted sick leave in the event of critical illness or severe injury to a

member of the immediate family creating an emergency, provided that not more than three days of sick leave per calendar year shall be granted therefore").

- **ACCRUAL LIMITS**

  CONN. AGENCIES REGS. § 5-247-2(a)(1)-(4) (2002) ("Sick leave accrues at the rate of one and one-quarter working days per completed calendar month of continues full-time service, which may be computed on an hourly basis, including authorized leave with pay provided that: (1) such leave starts to accrue only on the first working day of the calendar month and is credited to the eligible employee on the completion the the [*sic*] calendar month; (2) an eligible employee employed on less than a full-time basis shall be granted leave in proportion to the amount of time worked as recorded in the attendance and leave records; (3) no such leave will accrue for any calendar month in which an employee is on leave of absence without pay an aggregate of more than three working days; (4) sick leave shall accrue for the first twelve months in which an employee is receiving compensation benefits in accordance with section 5-142 or 5- 143 of the General Statutes.")

FLORIDA

- **MAXIMUM USE**

  FLA. ADMIN. CODE ANN. r. 60L-23.006(2) (2002) ("sick leave shall be authorized for illness or injury of a member of the employee's immediate family, as defined in 60K-5.013(8)(a), F.A.C., up to a maximum of 6 days (48 hours) during any calendar year when the employee's presence with the family member is necessary.").

- **ACCRUAL LIMITS**

  FLA. ADMIN. CODE ANN. r. 60K-5.030(1)(a)-(b) (2002) ("Full-time employees filing established positions who are paid on a monthly basis shall earn 8 hours and 40 minutes of sick leave for each full calendar month of employment, and full-time employees filing established positions who are paid on a biweekly basis shall earn 4 hours of sick leave for each full biweekly period worked."), ("Part-time employees who regularly work a fixed percentage of the pay period shall earn sick leave credits for the hours worked during that pay period proportionate to the time worked.").

GEORGIA

- **ACCRUAL LIMITS**

  GA. COMP. R. & REGS. r. 478-1-.18, § 18.300 (2001) ("A full-time employee compensated on a semi-monthly basis shall, at the end of each pay period, earn five (5) hours sick leave provided the employee is in pay status for at least forty (40) hours during the pay period. A full-time employee compensated on a monthly basis shall, at the end of each pay period, earn ten (10) hours sick leave provided the employee is in pay status for at least eighty (80) hours during the pay period. A part-time employee who works twenty (20) hours or more per week shall earn sick leave as specified in Par. 18.301.1; provided, however, such earnings and limitations shall be prorated by the percentage of time worked. The percentage of time worked shall be determined by dividing the employee's standard hours by forty (40).").

- **EXPRESSLY SUBJECT TO DISCRETION**

  GA. COMP. R. & REGS. r. 478-1-.18, § 18.303 (2001) ("Upon approval of the appointing authority an employee may use accrued sick leave for absence

due to personal illness or disability; absence necessitated by exposure to contagious disease by reason of which exposure the health of others would be endangered by the employee's attendance on duty; absence for dental or medical care; and for absence due to dental care or medical care, illness, accident or death in employee's immediate family which requires employee's presence.").

IDAHO

- **ACCRUAL LIMITS**

  IDAHO CODE § 67-5333(1) (2002) ("The rate per hour at which sick leave shall accrue to classified officers and employees earning credited state service shall be at the rate represented by the proportion 96/2080. Sick leave shall accrue without limit, and shall be transferable from department to department.").

ILLINOIS

- **ACCRUAL LIMITS**

  ILL. ADMIN. CODE tit. 80, § 303.90 (2002) ("All employees, excepting those in emergency, intermittent, per diem or temporary status, unless such status is the result of accepting a non-permanent working assignment in another class, shall accumulate sick leave at the rate of one day for each month's service.").

INDIANA

- **ACCRUAL LIMITS**

  IN. ADMIN. CODE tit. 31, r.2-11-4(b) (2002) ("Sick leave with pay shall accrue to full-time employees in the classified service at the rate of seven and one-half (7.5) hours for every two (2) full months of employment; plus seven and one-half (7.5) additional hours for every four (4) months of full-time employment. Employees working on a part-

time basis shall earn sick leave at the rate of three and three-fourths (3.75) hours for every two (2) months of employment; plus three and three-fourths (3.75) additional hours for every four (4) months of employment. Sick leave will not accrue to hourly, per diem, temporary, intermittent, or contractual employees or employees working less than half time.").

IOWA

- **MAXIMUM USE**

  IOWA ADMIN. CODE r. 581-14.3(19A) (2002) ("Employees may also use accrued sick leave, not to exceed a total of 40 hours per fiscal year, for the following purposes … For the temporary care of, or necessary attention to members of the immediate family.").

- **ACCRUAL LIMITS**

  IOWA CODE ANN. § 70A.1 (2002) ("Commencing July 1, 1979, permanent full-time and permanent part-time employees of state departments, boards, agencies, and commissions, excluding employees covered under a collective bargaining agreement which provides otherwise, shall accrue sick leave at the rate of one and one-half days for reach complete month of full-time employment. The accrual rate for part-time employees shall be prorated to the accrual rate for full-time employees. Sick leave shall not accrue during any period of absence without pay. Employees may use accrued sick leave for physical or mental personal illness, bodily injury, medically related disabilities, including disabilities resulting from pregnancy and childbirth, or contagious disease").

  IOWA ADMIN. CODE r. 581-14.3(19A) (2002) ("Probationary and permanent employees shall accrue sick leave at the rate of one and one-half

days (5.54 hours for the first and second biweekly pay periods, and 5.52 hours for the third biweekly pay period) for each month of full-time employment.")

- **EXPRESSLY SUBJECT TO DISCRETION**

  IOWA ADMIN. CODE r. 581-14.3(19A) (2002) ("Employees may also use accrued sick leave, not to exceed a total of 40 hours per fiscal year, for the following purposes: … For the temporary care of, or necessary attention to members of the immediate family. This leave shall be granted at the convenience of the employee whenever possible and consistent with the staffing needs of the appointing authority.").

KANSAS

- **ACCRUAL LIMITS**

  KAN. ADMIN. REGS. 1-9-5(b) (2001) ("The maximum sick leave credit an employee may accrue in any payroll period shall be 3.7 hours.").

KENTUCKY

- **ACCRUAL LIMITS**

  101 KY. ADMIN. REGS. 2:102 § 2(1)(a), (d), (e) (2001) ("An employee, except a part-time employee, shall accumulate sick leave with pay at a rate of one (1) working day per month."), ("A full-time employee who completes 120 months of total service with the state shall be credited with ten (10) additional days of sick leave upon the first day of the month following completion of 120 months of service."), ("A full-time employee who completes 230 months of total service with the state shall be credited with another ten (10) additional days of sick leave upon the first day of the month following completion of 240 months of service."), ("A employee with 240 or more months of total service

at the time of implementation of this section shall have the additional ten (10) days credited to the sick leave balance.").

KY. REV. STAT. ANN. § 161.155(2) (2001) ("Each district board of education shall allow to each teacher in its common school system not less than ten (10) days of sick leave during each school year, without deduction of salary.").

MAINE

- **ACCRUAL LIMITS**

  CODE ME. R. § 02-289, ch. 11, sec. 2(C)(1)(a) (2002) ("Sick leave shall be earned by each employee in the classified service, except temporary, emergency or project employees, at the rate of one (1) working day for each completed full month of service.").

- **EXPRESSLY SUBJECT TO DISCRETION**

  CODE ME. R. § 02-289, ch. 11, sec. 2(C)(4)(d) (2002) ("Employees may utilize their allowance of sick leave on the basis of application therefor approved by their respective appointing authorities and reported to the Director of Human Resources, for absences necessitated by illness or death in the immediate family of employees for such periods as the attendance of the employees shall be necessary. Immediate family as used here shall mean the spouse and the parents of the spouse; and the parents, guardian, children, brothers, sisters or wards of the employee.").

MARYLAND

- **ACCRUAL LIMITS**

  MD. CODE ANN., STATE PERS. & PENS. § 9-502 (2002) ("Fifteen days, not to exceed 120 hours of sick leave accrue to an employee each year on a pro

rata basis, from the beginning of the employee's State service.").

MASSACHUSETTS

- **ACCRUAL LIMITS**

  Rules Governing Paid Leave and Other Benefits for Managers and Confidential Employees as authorized by MASS. GEN. LAWS. ch. 7, § 28 (2002) (4.01 "Full-time employees shall accumulate sick leave with pay credits not to exceed 15 working days for each year of service (1.25 days/month)").

- **EXPRESSLY SUBJECT TO DISCRETION**

  Rules Governing Paid Leave and Other Benefits for Managers and Confidential Employees as authorized by MASS. GEN. LAWS. ch. 7, § 28 (2002) (4.07 "Sick leave shall be granted, at the discretion of the Appointing Authority, to employees only under the following conditions: Caring for the spouse, child, foster child, step child, parent, step parent, brother, sister, grandparent, grandchild of either the employee or his/her spouse, person for whom employee is legal guardian, or for a person living in the employee's immediate household who is seriously ill.").

MICHIGAN

- **ACCRUAL LIMITS**

  MICH. ADMIN. CODE r. 5.10(3)(A) (2001) ("Every career employee is credited with four hours of sick leave for each completed 80 hours of service.").

- **EXPRESSLY SUBJECT TO DISCRETION**

  MICH. ADMIN. CODE r. 5.10(3)(B)(1), (4) (2001) ("Any use of sick leave by an employee must have the approval of the appointing authority."), ("Sick leave may be used by an employee for any of the following reasons: Personal illness, injury, serious health condition, temporary disability, exposure to

contagious disease endangering others, or for illness or injury in the immediate family which necessitates absence from work.").

MISSISSIPPI

- ACCRUAL LIMITS

  MISS. CODE ANN. § 25-3-93(1)(a) (2001) (One month to 3 years accrues 12 hours per month, 18 days per year; 37 months to 8 years accrues 14 hours per month, 21 days per year; 97 months to 15 years accrues 16 hours per month, 24 days per year; over 15 years accrues 18 hours per month, 27 days per year).

MISSOURI

- ACCRUAL LIMITS

  MO. CODE OF REGS. ANN. tit. 1, § 20-5.020(2)(B)(1) (2002) ("Employees who are employed on a full-time basis in positions of a continuing or permanent nature shall be allowed sick leave with full pay as follows: If they are paid on a monthly pay period, computed at the rate of ten (10) hours for reach calendar month of service in which they are in pay status for one hundred sixty (160) or more hours. Sick leave will be credited at the rate of one-half (1/2) the full-time accrual rate for months in which they are in pay status from eighty to one hundred nineteen (80-119) hours and three-fourths (3/4) the full-time rate for months in which they are in pay status from one hundred twenty to one hundred fifty-nine (120-159) hours.").

- EXPRESSLY SUBJECT TO DISCRETION

  MO. CODE OF REGS. ANN. tit. 1, § 20-5.020(2)(K) (2002) ("Loss of time due to an illness of the employee's spouse, children, other relatives or members of the employee's household, which requires the employee's personal care and attention

shall be charged against the employee's accumulated sick leave. The final decision concerning the granting of leave under this section shall rest with the appointing authority and shall be based upon the degree to which the employee is responsible for providing personal care and attention").

MONTANA

- ACCRUAL LIMITS

  MONT. CODE ANN. § 2-18-618(1) ("A permanent full-time employee earns sick leave credits from the first day of employment. For calculating sick leave credits, 2,080 hours (52 weeks x 40 hours) equals 1 year. Sick leave credits must be credited at the end of each pay period. Sick leave credits are earned at the rate of 12 working days for each year of service without restriction as to the number of working days that may be accumulated. Employees are not entitled to be paid sick leave until they have been continuously employed 90 days.").

NEBRASKA

- ACCRUAL LIMITS

  NEB. ADMIN. CODE ch. 9, § 005 (2002); NEB. ADMIN. CODE ch. 2, § 007 (2002) (First year through fifth year, 12 days; sixth year, 17 days; seventh year, 18 days; eighth year, 19 days; ninth year, 20 days; tenth year, 21 days; eleventh year, 22 days; twelfth year, 23 days; thirteenth year, 24 days; fourteenth year, 25 days; fifteenth year, 26 days; sixteenth year, 27 days; seventeenth year, 29 days; nineteenth year and more, 30 days; maximum accrual, 180 days).

NEVADA

- **MAXIMUM USE**

  NEV. ADMIN. CODE ch. 284.558(1) (2002) ("Except as otherwise provided in this section, if an employee is needed to provide care for a member of his immediate family with an illness or other authorized medical need, the employee may use his accumulated sick leave, not to exceed 120 hours in any 1 calendar year. An employee is not subject to this 120-hour rule if the leave is approved under the Family and Medical Leave Act.").

- **ACCRUAL LIMITS**

  NEV. REV. STAT. 284.355(1) (2002) ("Except as otherwise provided in this section, all employees in the public service, whether in the classified or unclassified service, are entitled to sick and disability leave with pay of 1 1/4 working days for each month of service, which may be cumulative from year to year.").

NEW HAMPSHIRE

- **MAXIMUM USE**

  N.H. CODE ADMIN. R. ANN. PER. 1204.05(c) (2002) ("An employee shall be entitled to utilize up to 5 days of sick leave per fiscal year for the care of dependents residing in the employee's household.").

- **ACCRUAL LIMITS**

  N.H. CODE ADMIN. R. ANN. PER. 1204.05(b) (2002) (Zero to eight continuous years of work, 15 days accrued; nine to fifteen continuous years of work, 15 days accrued; sixteen continuous years of work or more, 15 days accrued).

NEW JERSEY

- **MAXIMUM USE**

  N.J. ADMIN. CODE tit. 4A, § 6-1.3(g)(3) (2002) ("Sick leave may be used by employees who are unable to work because of: Care for a reasonable period of time, of a seriously ill member of the employee's immediate family").

- **ACCRUAL LIMITS**

  N.J. ADMIN. CODE tit. 4A, § 6-1.3(a)(1)-(2), (b) (2002) ("Full-time State employees shall be entitled to annual paid sick leave as set forth in (a)1 and 2. Full-time local employees shall be entitled to a minimum of annual paid sick leave as follows: 1. New employees shall only receive one working day for the initial month of employment if they begin work on the 1st through 8th day of the calendar month, and one-half working day if they begin on the 9th through the 23rd day of the month. 2. After the initial month of employment and up to the end of the first calendar year, employees shall be credited with one working day for each month of service. Thereafter, at the beginning of each calendar year in anticipation of continued employment, employees shall be credited with 15 working days."), ("Part-time employees shall be entitled to a proportionate amount of paid sick leave.").

NEW MEXICO

- **ACCRUAL LIMITS**

  N.M. ADMIN. CODE tit. 1, § 1.7.7.10(A), (B) (2001) ("Employees, except those on full-time educational leave with pay, absence without leave, leave without pay, unpaid FMLA leave, or suspension, shall accrue sick leave at the rate of 3.69 hours per pay period."), ("Employees employed on a part-time

basis and employees on furlough who work at least eight hours in a pay period shall accrue sick leave on a prorated basis.").

NEW YORK

- MAXIMUM USE

  N.Y. COMP. CODES R. & REGS. tit. 4, § 28-2.1(g) (2002) ("In addition to personal illness of the employee, the following types of leaves of absence when approved by the appointing authority, may be charged against accumulated sick leave credits: illness or death in the employee's family, provided, however, that charge for such absence shall not exceed a maximum of 15 days in any one year").

- ACCRUAL LIMITS

  N.Y. CIV. SERV. APP. § 21.3(b) (2002); N.Y. COMP. CODES R. & REGS. tit. 4, § 28-2.1(b) (2002) ("Employees shall earn sick leave credits at the rate of one-half day per biweekly pay period and may accumulate such credits up to a total of 150 days; provided, however, that an employee shall not earn sick leave credit for any biweekly pay period unless he is in full pay status for at least seven work days during such biweekly pay period. A part-time employee who is required to work a fixed number of hours, five days per week, shall also earn sick leave credit as provided herein, but his total pay when absent on such leave shall be the amount which would have been due him had he been working regularly at his usual hours for such period.").

  N.Y. COMP. CODES R. & REGS. tit. 4, § 28-2.1(c) (2002) ("Employees who are on the payroll on the date on which sick leave credits are otherwise to be granted shall be entitled to eight days of sick leave credits for each 12 months of service up to a total of 200 days. Effective January 1, 2000, up to 200 days of such credits may be used to pay for health

insurance in retirement in accordance with section 167(4) of the Civil Service Law. Such sick leave shall be credited as follows: (1) Four days of sick leave credits upon completion of six months of State service; provided, however, that any eligible employee electing to participate in the Income Protection Plan pursuant to Part 78 of this Title (President's Regulations) shall immediately receive four days of such sick leave credit on the effective date of such election. (2) Part-time employees shall be granted sick leave credits not to exceed four days following completion of each six months of State service which credits shall be prorated based on the percentage of full-time service such employee is scheduled to work on each sick leave grant.").

- EXPRESSLY SUBJECT TO DISCRETION

  N.Y. COMP. CODES R. & REGS. tit. 4, § 28-2.1(g) (2002) ("In addition to personal illness of the employee, the following types of leaves of absence when approved by the appointing authority, may be charged against accumulated sick leave credits: illness or death in the employee's family, provided, however, that charge for such absence shall not exceed a maximum of 15 days in any one year").

  N.Y. CIV. SERV. APP. § 21.3(f) (2002) ("In addition to personal illness of the employee, the following types of leaves of absence when approved by the appointing authority, may be charged against accumulated sick leave credits: illness or death in the employee's family, provided, however, that charge for such absence shall not exceed a maximum of 15 days in any one year").

NORTH CAROLINA

- ACCRUAL LIMITS

  N.C. ADMIN. CODE tit. 25, r. 1E.0301(a)-(b) (2002) ("Sick leave credits at the rate of 8 hours per

month or 96 hours per year shall be provided for a full-time or part-time (half-time or over) employee with a permanent, trainee, probationary or time-limited appointment who is in pay status for one-half of the regularly scheduled workdays and holidays in a pay period."). ("Leave for part-time employees shall be computed as a percentage of total amount provided to a full-time employee.").

NORTH DAKOTA

- **MAXIMUM USE**

  N.D. CENT. CODE § 54-52.4-03 (2001) ("An employer that provides leave for its employees for illnesses or other medical or health reasons shall grant an employee's request to use that leave to care for the employee's child, spouse, or parent if the child, spouse, or parent has a serious health condition. An employee may take not more than forty hours of leave under this section in any twelve-month period. The employer shall compensate the employee for leave used by the employee under this section on the same basis as the employee would be compensated if the leave had not been taken due to the employee's own illness.").

  N.D. ADMIN. CODE § 4-07-13-07(3) (2002) ("Sick leave may be used by an employee when: The employee wishes to attend to the needs of the employee's eligible family members who are ill or to assist them in obtaining other services related to their health or well-being. Sick leave used for these purposes may not exceed forty hours per calendar year.").

- **ACCRUAL LIMITS**

  N.D. ADMIN. CODE § 4-07-13-04 (2002) (Zero to all years of services accrues 8 hours per month).

OHIO

- **ACCRUAL LIMITS**

  OHIO REV. CODE ANN. § 124.382(B) (West 2002) ("Each full-time permanent and part-time permanent employee whose salary or wage is paid directly by warrant of the auditor of state shall be credited with sick leave of three and one-tenth hours for each completed eighty hours of service, excluding overtime hours worked.").

  OHIO REV. CODE ANN. § 3319.141 (West 2002) ("Each person who is employed by any board of education in this state shall be entitled to fifteen days sick leave with pay, for each year under contract, which shall be credited at the rate of one and one-fourth days per month.").

- **EXPRESSLY SUBJECT TO DISCRETION**

  OHIO REV. CODE ANN. § 124.382(D) (West 2002) ("Employees may use sick leave, provided a credit balance is available, upon approval of the responsible administrative officer of the employing unit, for absence due to personal illness, pregnancy, injury, exposure to contagious disease which could be communicated to other employees, and to illness, injury, or death in the employee's immediate family.").

  OHIO REV. CODE ANN. § 3319.141 (West 2002) ("Teachers and nonteaching school employees, upon approval of the responsible administrative officer of the school district, may use sick leave, for absence due to personal illness, pregnancy, injury, exposure to contagious disease which could be communicated to other employees, and to illness, injury, or death in the employee's immediate family.").

OKLAHOMA

- **ACCRUAL LIMITS**

  OKLA. ADMIN. CODE § 530:10-15-10(c) ("Annual and sick leave accrual rates and accumulation limits are based on cumulative periods of employment calculated in a manner that cumulative service is determined for longevity purposes [74:840-2.20(1)];" Schedule A and Schedule B 15 days of sick leave accrued per year.).

OREGON

- **ACCRUAL LIMITS**

  OR. REV. STAT. ANN. § 240.551 ("The Personnel Division shall establish the hours of work, holidays, leaves of absence with and without pay and vacations of employees in the state classified service. The division may delegate this responsibility to individual operating agencies where appropriate.").

PENNSYLVANIA

- **MAXIMUM USE**

  4 PA. ADMIN. CODE § 30.23(5) (2002) ("Sick leave shall be granted when an employee is required to be absent from work for one of the following reasons: Serious illness of a member of the employee's immediate family which requires the employee's absence from work not to exceed 5 days in a calendar year. Immediate family is defined as the following persons: Husband, wife, child, stepchild, parent, brother or sister of the employee.").

- **ACCRUAL LIMITS**

  4 PA. ADMIN. CODE § 30.22(a) (2002) (Employees who work 37.5 hours a week accrue 97.5 sick leave hours per year; employees who work 40 hours a week accrue 104 hours per year).

RHODE ISLAND

- **MAXIMUM USE**

  R.I. CODE R. 01 060 001-80 § 5.0623 (2001) ("Sick leave is hereby defined to mean a necessary absence from duty due to illness, injury, or exposure to contagious disease and may include absence due to illness or death in the immediate family of the employee or necessary attendance upon a member of the immediate family who is ill. Sick leave with pay for the purpose of such attendance, however, is to be used only in emergency and is limited to 10 working days within any calendar year.").

- **ACCRUAL LIMITS**

  R.I. CODE R. 01 060 001-80 § 5.062 ("Unless modified by a particular union contract, all full-time employees whether on standard 35 or 40 hour workweek or on a non-standard workweek, and part-time employees who work at least 16 hours per week or whose work schedule requires the performance of service to the state for some part of each working day of the official schedule to which the class is assigned, shall accrue .0557 hours for each hour of service during the biweekly pay period up to a maximum of assigned hours in the workweek for the position in which the employee is working.").

SOUTH CAROLINA

- **MAXIMUM USE**

  S.C. CODE. ANN. § 8-11-40 (2001) ("Employees earning sick leave as provided in Section 19-710 may not use more than eight days of sick leave annually to care for ill members of their immediate families. For purposes of this eight days of sick leave, the employee's 'immediate family' means the employee's spouse and children and the following

relations to the employee or spouse of the employee: mother, father, brother, sister, grandparent, legal guardian, and grandchildren of the grandchild resides with the employee and the employee is the primary caretaker of the grandchild.").

S.C. CODE ANN. REGS. § 19-710.04(B)(6) (2002) ("Reasons an employee shall be allowed to use sick leave are as follows: Caring for ill members of immediate family [Note: Employees earning sick leave as provided in Section 19-710 may not use more than eight days of sick leave annually to care for ill members of their immediate families. For purposes of this eight days of sick leave, the employee's 'immediate family' means the employee's spouse and children and the following relations to the employee or spouse of the employee: mother, father, brother, sister, grandparent, legal guardian, and grandchildren of the grandchild resides with the employee and the employee is the primary caretaker of the grandchild.]").

- **ACCRUAL LIMITS**

  S.C. CODE. ANN. § 8-11-40 (2001) ("All permanent full-time state employees are entitled to fifteen days sick leave a year with pay. Sick leave is earned by permanent full-time state employees at the rate of one and one-fourth days a month and may be accumulated, but no more than one hundred eighty days may be carried over from one calendar year to another.").

SOUTH DAKOTA

- **MAXIMUM USE**

  S.D. ADMIN. R. 55:01:22:02.04(2) (2002) ("An employee may use up to 40 hours of accumulated sick leave annually for the following purposes: The temporary care of members of the immediate family").

- **ACCRUAL LIMITS**

  S.D. ADMIN. R. 55:01:22:0 (2002) ("Sick leave may be accrued in equal increments on no more than 80 hours each biweekly pay period. Employees paid monthly shall accumulate sick leave at a rate of 9.334 hours per month. Employees who work less than full time shall accrue prorated sick leave based on the number of hours paid in the pay period.").

TENNESSEE

- **ACCRUAL LIMITS**

  TENN. COMP. R. & REGS. 1120-6-.12 (2002) ("Sick leave is accrued by an employee at the rate of one (1) day for each month or major fraction of a month of active service.").

- **EXPRESSLY SUBJECT TO DISCRETION**

  TENN. CODE ANN. § 8-50-802(a)(1), (a)(3) (2001) ("Sick leave may be granted to each officer and employee who is scheduled to work one thousand six hundred (1,600) hours or more in a fiscal year, whether compensated on an hourly, daily, monthly, or piecework basis, at the rate of one (1) day for each month of service or major fraction thereof, at the discretion of the head of the department or agency and with approval of the commissioner of personnel."), ("Sick leave may only be used for absence from duty because of illness or disability due to accident of employee, the employee's exposure to contagious diseases, or because of illness or death in the immediate family of the employee for such period as the attendance of the employee shall be necessary, except hereinafter provided.").

  TENN. COMP. R. & REGS. 1120-6-.12.(1) (2002) ("An appointing authority may grant an eligible

employee sick leave for any of the following reasons: illness or death in the immediate family, or others who, at the discretion of the appointing authority, have a relationship which merits similar consideration.").

TEXAS

- ACCRUAL LIMITS

  TEX. GOV'T CODE ANN. § 661.202(c) (2002) ("Sick leave entitlement for a full-time employee accrues at the rate of eight hours for each month of state employment. A part-time employee accrues sick leave on a proportionate basis. An employee who is employed by the state during any part of a calendar month accrues sick leave entitlement for the entire calendar month. Sick leave accumulates with the unused amount of sick leave carried forward each month.").

UTAH

- ACCRUAL LIMITS

  UTAH ADMIN. CODE R. 477-8-7(4)(a) (2002) ("Employees shall accrue sick leave with pay at the rate of four hours each pay period. Sick leave shall accrue without limit.").

VIRGINIA

- ACCRUAL LIMITS

  VA. CODE ANN. 51.1-1107(A) ("On the effective date of coverage for existing employees, and thereafter on each January 10, existing participating employees shall receive an amount of family and personal leave based on the number of months of state service as an eligible employee as follows: Less than 120 months [of state service], 32 hours; 120 or more months [of state service], 40 hours.")

WASHINGTON

- ACCRUAL LIMITS

  WASH. ADMIN. CODE § 356-18-050(2)(a)-(c) (2002) ("Full-time employees shall be credited monthly with eight hours of sick leave under the following conditions: (a) The employee must be employed for fifteen calendar days or more during the month. (b) Any leave without pay taken during the month will not be counted toward the fifteen calendar day requirement. (c) Holidays for which the employee is otherwise eligible that fall within the qualifying fifteen days count toward the minimum requirement. Sick leave credit for other than full-time employees shall be computed and accrued in an amount proportionate to the time the employee is in pay status during the month to that required for full-time employment.").

WEST VIRGINIA

- MAXIMUM USE

  W. VA. CODE ST. R. § 143-1-14.4(f)(6) (2002) ("Accrued sick leave shall be granted to employees for the following reasons: Absence for illness or routine dental and medical appointments of a member of an employee's immediate family as defined in this rule, including reasonable travel time, if requested, not to exceed a total of three hours per occurrence, shall be charged to accrued sick leave, not to exceed 40 hours per calendar year").

- ACCRUAL LIMITS

  W. VA. CODE ST. R. § 143-1-14.4(a) (2002) ("Except as otherwise provided in this subdivision, each employee shall receive accrued sick leave with pay and benefits. Sick leave is computed on the basis of hours equal to 1.5 days per month for full-

time employees. Sick leave is accrued at the end of each pay period or on the last work day for separating employees. It may be prorated for employees granted a medical leave of absence or satisfying the conditions for approval of a medical leave of absence in accordance with 14.8(c) of this rule. Prorated leave is computed in the proportion to hours worked during this pay period. Sick leave cannot be accrued for hours no paid nor for hours worked beyond the normal work week which shall not exceed 40 hours. There is unlimited accumulation of sick leave.").

WISCONSIN

- **MAXIMUM USE**

  WIS. ADMIN. CODE § ER 18.03(4)(c) (2002) ("Each employee who has accrued sick leave credits shall be eligible to use sick leave for periods of absence from employment, as follows: For temporary emergency medical care of ill or injured members of the immediate family for a limited period of time to permit the employee to make other arrangements. Use of sick leave for temporary emergency care of immediate family members is limited to 5 work days for any one illness or injury; however, the use of sick leave may be extended to cover unusual circumstances provided prior approval is obtained from appointing authority.").

- **ACCRUAL LIMITS**

  WIS. ADMIN. CODE § ER 18.03(2)(a) (2002) ("Sick leave credit shall accrue at the rate of 0625 hour for each hour in pay status, not to exceed 5 hours in any biweekly pay period.").

WYOMING

- **ACCRUAL LIMITS**

  WYO. R. & REGS. ch. 10, § 2(a)(i), (iv), (d) (2002) ("Permanent and probationary employees shall accrue sick leave according to the number of hours worked in the month."), ("The following rates shall be used: 160 or more hours – 8 hours per month; 40 through 159 hours – Prorated according to formula; 39 or less hours – no accrual.").

- **EXPRESSLY SUBJECT TO DISCRETION**

  WYO. R. & REGS. ch. 10, § 2(b), (d) (2002) ("Accrued sick leave may be used during scheduled work hours when an employee is incapacitated by sickness or injury; for pregnancy, childbirth or related medical conditions; for medical, dental or optical examinations or treatment; for death or illness of a member of the employee's or the employee's spouse's immediate family and such other persons as approved by the agency head; or when an employee has been exposed to a contagious disease such that attendance at work could jeopardize the health of others."), ("The agency head shall approve the use of sick leave only after having determined that the absence was for a legitimate reason.").